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IN THE

Supreme Court of the United States

October Term, 1979
No. 78-1335

VILLAGE OF SCHAUMBURG,

Petitioner,

vs.

CITIZENS FOR A BETTER ENVIRONMENT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Motion for Leave to File Brief Amicus Curiae and Brief Amicus Curiae.

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CITIZENS FOR A BETTER ENVIRONMENT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

The Holy Spirit Association for the Unification of World Christianity (hereinafter, "Unification Church" or "Church"), hereby respectfully moves, pursuant to Rule 42(3) of this Court, for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner was requested but refused. The motion is based on the following grounds.

1. Interest of the Unification Church.

The Unification Church is a California non-profit, religious corporation, holding, *inter alia*, federal, California, and Illinois tax exemptions. The Unification

Church was founded in 1954 and is now established in hundreds of cities throughout the United States and the world. The Church teaches fundamental religious beliefs, and emphasizes prayer, evangelical missionary engagements, religious rallies, workshops, retreats, and lectures. An important part of the Church's activities in furtherance of its beliefs consists of public-place and door-to-door proselytizing of its tenets and principles and the distribution of religious literature, frequently accompanied by the solicitation of funds from the public for support of the Church.

In the latter connection, the Church and its members deal on a continuing basis with state and local ordinances regulating public solicitations of funds, such as the ordinance of the Village of Schaumburg at issue here. On numerous occasions, the Church or its members have been obliged to engage in litigation concerning the validity of these ordinances,* and they expect that such litigation will similarly be necessary in the future. In consequence, the Church has a continuing interest in the development of the law in this area,

*Recent cases in which the Unification Church or its members have challenged the validity of local solicitation ordinances include, *e.g.*, *Holy Spirit Association for the Unification of World Christianity v. Alley*, 460 F.Supp. 346 (N.D. Tex. 1978); *Cherris v. Amundson*, 460 F.Supp. 326 (E.D. La. 1978); *Hall v. McNamara*, 456 F.Supp. 245 (N.D. Cal. 1978); *Swearson v. Meyers*, 455 F.Supp. 88 (D. Kan. 1978); *Love v. Mayor of Cheyenne*, 448 F.Supp. 128 (D. Wyo. 1978); *Levers v. City of Tullahoma*, 446 F.Supp. 844 (E.D. Tenn. 1978); *Evans v. Fullard*, 444 F.Supp. 1334 (W.D. Pa. 1978). *See also, e.g., Heritage Village Church and Missionary Fellowship, Inc. v. North Carolina*, 253 S.E.2d 473 (N.C. Ct. App. 1979) (Unification Church an intervenor in action challenging state statute).

an interest which is especially acute where a case before this Court may very well have an impact on pending and future actions in which the Church or its members are involved.

More particularly, the interest of the Unification Church in this case arises from the fact that it and its members are plaintiffs in a case presently pending in the United States District Court for the Northern District of Illinois which challenges the validity of precisely the same ordinance which is at issue in this case. *Hartman v. Village of Schaumburg*, No. 78C 4427 (N.D. Ill., filed November 8, 1978). Accordingly, the decision of the Court in the present case will necessarily have a significant impact on the pending *Hartman* litigation.

2. Questions of Law Not Presented by the Parties.

The ordinance at issue in the instant case, Schaumburg, Ill., Code §22-19, *et seq.* (1974), constitutes an attempt by petitioner Village to regulate solicitations for charitable purposes in a rather comprehensive manner. In particular, the ordinance, *id.* at §22-20, requires that "[e]very charitable organization, which solicits or intends to solicit contributions from persons in the village . . . shall prior to such solicitation apply for a permit." It then sets forth seven items of "information" which must be supplied to the village clerk before any such permit may issue. The ordinance contains a number of other specific restrictions on solicitation. *Id.* at §§22-22, 22-23, 22-24.

In the instant case, however, the parties have focused their entire attention on only one sub-part of the ordinance, §22-20(g), and have treated it in isolation from the permit application process as a whole. Under the circumstances, this manner of presentation of the issue does not clearly and completely bring the question of the validity of the ordinance before the Court.

Since it is likely that the parties will pursue the same course in this Court, the brief which the Unification Church seeks leave to file as *amicus curiae* will contain a more complete argument as to the ordinance as a whole, placing the sole challenged provision in its proper context. Further, the brief will argue that settled principles compel the conclusion that the ordinance is constitutionally defective on numerous grounds even apart from §22-20(g) viewed as a single specific restriction on the exercise of first amendment rights. These issues have not been and, the church believes, will not be, addressed by the parties. If these arguments are accepted, they would be dispositive of the case.

Moreover, the language of the ordinance does not preclude its application to purely religious solicitation, and the pending *Hartman* litigation affirmatively demonstrates that petitioner has construed the ordinance to apply to such solicitation. The Unification Church, as a religious organization, is in a position to view the ordinance in this context, and has done so in its brief. The Church believes that this is a useful perspective for the case, but does not anticipate that respondent, a political group concerned specifically

with environmental action, will address many of the issues thus raised.

Accordingly, and for the foregoing reasons, the motion of the Unification Church for leave to file a brief *amicus curiae* should be granted.

Dated: July 21, 1979.

Respectfully submitted,

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BRIEF AMICUS CURIAE.

INTEREST OF AMICUS CURIAE.

The interest of *amicus curiae* is set out in the Motion for Leave to File Brief Amicus Curiae, *supra*.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED.

This case involves the first and fourteenth amendments to the Constitution of the United States, and Schaumburg, Ill., Code, ch. 22, art. III (§22-19 *et seq.*) (1974). The relevant provisions are set forth in Appendix A hereto.

QUESTIONS PRESENTED.

Whether Schaumburg, Ill., Code, ch. 22, art. III (§22-19 *et seq.*) (1974) relating to charitable solicitations is facially unconstitutional under the first and fourteenth amendments to the United States Constitution where the ordinance:

1. Is vague in its coverage, and may be read to include solicitations by political and religious organizations; and

2. Requires a permit to engage in first amendment protected activity, but, through the use of vague terms in the permit application procedure, effectively vests unbridled discretionary authority in the licensor to grant or deny such a permit; and

3. Makes no provision whatever for first amendment due process procedural safeguards mandated by *Freedman v. Maryland*, 380 U.S. 51 (1965), and its progeny; and

4. Contains, with no compelling interest in support thereof, several specific restrictions on the exercise of first amendment-protected activities, including

a. A curfew prohibiting solicitation on Sundays and on any other day before 9:00 A.M. and after 6:00 P.M.;

b. A prohibition on solicitation by any person indicted for or convicted of a felony; and

c. An exaction of a flat permit fee; and

d. A requirement of a statement of statutory compliance not available to religious organizations; and

5. Prohibits solicitation by any charitable organization, including those religious or political, which does not meet an arbitrary standard of efficiency in fundraising, measured by a 25% limitation on the "costs" of solicitation.

SUMMARY OF THE ARGUMENT.

The principle that the first amendment protects fund solicitations to support religious activities was established forty years ago in *Schneider v. New Jersey*, 308 U.S. 147 (1939), and this Court has consistently treated religious solicitation as speech entitled to the highest degree of constitutional protection. Accordingly, Schaumburg's vaguely-worded charitable solicitation ordinance, which may be, and apparently is, applied to both religious and charitable solicitation, which subjects such solicitation to a self-proclaimed standard of efficiency embodied in the percentage limitation, constitutes an unjustifiable and unconstitutional burden on protected speech. Further, with respect to religious solicitations, to direct the allocation of church resources may well violate, in addition, the command of the

religion clause which prohibits state entanglement in church affairs and restrictions upon free exercise of religion.

Apart from the percentage limitation, the Schaumburg ordinance as a whole is constitutionally defective on its face on independent grounds. First, the ordinance is facially unconstitutional in that it vests discretion in the licensing authority to grant or to deny licenses for the exercise of first amendment rights but totally fails to provide the narrow and objective standards which are required to confine the imposition of prior restraints on protected speech. The resulting problem of unbridled discretion is made worse by the inclusion of vague terms which, not only fail to inform those subject to the ordinance of the conduct required of them, but also invite those administering the ordinance to apply it subjectively and in a potentially lawless manner.

Second, the ordinance is facially unconstitutional in that it makes no attempt to provide the procedural due process safeguards mandated by *Freedman v. Maryland*, 380 U.S. 51 (1965). Such safeguards are required of any statutory scheme which, like the Schaumburg ordinance, requires a permit or other official authorization as a condition to engaging in first amendment expression.

Finally, several other specific features of the ordinance, for example, the restriction on solicitations by those convicted of or indicted for a felony, the exaction of a flat licensing fee, the requirement of a statement of statutory compliance not available to religious organizations, and the imposition of a curfew which partially closes the streets and parks of the village

to first amendment expression, constitute overt restrictions on the exercise of first amendment rights. There being no compelling state interest sufficient to justify such effective censorship of protected speech, the Schaumburg ordinance is in this respect, too, constitutionally defective.

ARGUMENT.

I.
INTRODUCTION.

This case is a challenge by respondent Citizens for a Better Environment, an organization whose stated purpose is the protection and improvement of the Illinois environment, to a provision of an ordinance of petitioner Village of Schaumburg, Schaumburg, Ill., Code, ch. 22, art. III (§§22-19 *et seq.*) (1974) (the "Charitable Solicitation Ordinance") on the grounds that the provision is constitutionally invalid under the first and fourteenth amendments to the United States Constitution. The District Court granted respondent's motion for summary judgment in an unreported decision, holding the challenged provision unconstitutional. The Court of Appeals affirmed the judgment of the District Court. *Citizens for a Better Environment v. Village of Schaumburg*, 590 F.2d 220 (7th Cir. 1978).

Since the action as filed and decided referred only to a single isolated provision of the entire ordinance, and since the ordinance as a whole is under settled principles unconstitutional on its face, the purpose of the instant brief is to present to the Court arguments which place the sole challenged provision in its appropriate legal context.

The ordinance requires in §22-20 that any "charitable organization", as defined in §22-19 as one "which solicits or intends to solicit contributions from persons in the village by door-to-door solicitation or the use of the public streets and public ways", obtain a permit from the village prior to engaging in any such activity. As discussed in detail below, the definitions of "charitable organization" and "charitable purposes", as provided in §22-19, are vague and may be read to include organizations either political or religious in character, thereby implicating core principles of the first amendment. Numerous terms contained in §22-20, which sets out the "information" to be supplied in the permit application, are also vague. The particular provision whose constitutionality was litigated below in isolation, §22-20(g), is only one of these items of information which is fatally vague. Consequently, the entire permit and permit application scheme is facially unconstitutional pursuant to both *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), and the long line of decisions holding unconstitutional laws which grant discretion to an official to grant or deny permits for the exercise of rights protected by the first amendment. Thus, petitioner's contention that summary judgment was improperly granted is without merit since the law is unconstitutional on its face.

That laws which delegate standardless authority to officials to grant or to deny permits for the exercise of first amendment rights are facially unconstitutional for overbreadth is well established. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Kunz v. New York*, 340 U.S. 290 (1951); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Lovell v. City of Griffin*, 303 U.S. 444 (1938). A similar doctrine is applicable under the vagueness principles of *Hynes v. Mayor of Oradell, supra*, at 621 n. 5.[1] As further discussed below, the ordinance is facially unconstitutional for the further reason that it does not contain

[1]Petitioner apparently submitted no affidavit in opposition to respondent's affidavit to the effect that respondent intended to engage in first amendment-protected activity.

the procedural safeguards mandated by *Freedman v. Maryland,* 380 U.S. 51 (1965), and its progeny for laws which require official permission as a condition for the exercise of first amendment-protected rights.

Accordingly, since Schaumburg's permit scheme itself is facially invalid, the other provisions of the ordinance, Schaumburg, Ill., Code §§22-22 (fee); 22-23 (prohibition of solicitation by any person convicted of or indicted for felony); 22-24 (curfew) (1974), all of which apply only to solicitations under authority of a permit, must also fall. But in any event, as discussed below, many of these specific restrictions are themselves independently unconstitutional.

II.

SOLICITATION OF FINANCIAL SUPPORT FOR A CHURCH IS EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

The principle that the first amendment protects fund solicitations to support a church was established forty years ago. As this principle preserves religious belief in a capitalist society, it is no less vital today.

There is no inherent reason to differentiate an appeal for support of a church from an appeal for belief in its tenets, which no one would dispute is protected expression. On the contrary, freedom of expression protects the advocacy of action almost as zealously as it does the abstract expression of ideas. *Compare Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969), *with Yates v. United States,* 354 U.S. 298, 318-27 (1957). "'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins,* 323 U.S. 516, 537 (1945).

Consequently this Court has treated religious solicitation as protected speech. An Irvington, New Jersey, ordinance forbade solicitation, and a conviction under it was upheld by the New Jersey courts because the defendant's religious solicitation amounted to the solicitation of monetary contributions without a permit. This Court reversed because the licensing law which regulated this activity was unconstitutional on its face.

> *Conceding that fraudulent appeals may be made in the name of charity and religion,* we hold a municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be carried to the homes of citizens; some persons may, while others may not, disseminate information from house to house.

Schneider v. New Jersey, 308 U.S. 147, 164 (1939) (emphasis added).

Similarly, the ordinance reviewed in *Cantwell v. Connecticut,* 310 U.S. 296 (1940), affected only those who wished to solicit funds and required a certificate from a public official as a condition to do so. Once again this Court invalidated a conviction for violating the ordinance because

> *to condition the solicitation of aid for the perpetuation of religious views* or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, *is to lay a forbidden burden upon the exercise of liberty protected by the Constitution.*

Id. at 307 (emphasis added).

In later cases, the Court again noted the intimate relationship between fundraising and the dissemination of ideas. In reliance upon *Cantwell* and *Schneider*, this Court held that handbills could not be deemed to be commercial and consequently prohibitable "because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes". *Jamison v. Texas*, 318 U.S. 413, 417 (1943). Similarly, the incidental solicitation of donations did not render the activities of religious colporteurs commercial.

> It is plain that religious organizations need funds to remain a going concern. . . . Freedom of speech, freedom of the press, freedom of religion, are available to all, not merely to those who can pay their own way.

Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).[2]

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[2]In reliance upon these decisions the lower courts have unanimously agreed that the solicitation of funds by the Unification Church is protected by the first amendment. No fewer than six recent cases have declared the protected status of this activity to be "well-settled".

> It is well-established that solicitation of donations for church support is a protected First Amendment activity. *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). . . .

Holy Spirit Association for the Unification of World Christianity v. Alley, 460 F.Supp. 346, 347 (N.D. Tex. 1978). *Accord, Cherris v. Amundson*, 460 F.Supp. 326, 327 (E.D. La. 1978); *Smith v. City of Manchester*, 460 F.Supp. 30, 34 (E.D. Tenn. 1978); *Hall v. McNamara*, 456 F.Supp. 245, 246 (N.D. Cal. 1978); *Swearson v. Meyers*, 455 F.Supp. 88 (D. Kan. 1978); *Evans v. Fullard*, 444 F.Supp. 1334, 1337 (W.D. Pa. 1978). As explained in still another Unification Church case, the activities of the church fundraisers

> are non-commercial in nature. Members of the Church do not receive commissions for their work. In making their door-to-door solicitations, nothing is ever sold. Contributions are requested and items may be gratuitously extended to the contributor because of his or her donation, but if a resident inquires as to the price of an item the church member explains that it is not for sale and that the item is offered to contributors only as a token of appreciation for a contribution. The average value of the items offered is 40 cents, whereas the average contribution is between one and two dollars and, in many instances, the resident rejects the gift despite the fact that a contribution has been made.

Love v. Mayor of Cheyenne, 448 F.Supp. 128, 130-31 (D. Wyo. 1978). *See also Levers v. City of Tullahoma*, 446 F.Supp. 884, 886 (E.D. Tenn. 1978) (temporary restraining order); *Heritage Village Church and Missionary Fellowship, Inc. v. North Carolina*, 253 S.E.2d 473 (N.C. Ct. App. 1979) (Unification Church intervening party).

Similarly, solicitation by the International Society for Krishna Consciousness has consistently been held to be protected expression as well. *See ISKCON v. Bowen*, No. 78-2278 (7th Cir. May 16, 1979); *ISKCON v. Rochford*, 585 F.2d 263 (7th Cir. 1978); *Fernandes v. Limmer*, 465 F.Supp. 493, 497 (N.D. Tex. 1979); *United States v. Silberman*, 464 F.Supp. 866, 872 (M.D. Fla. 1979) (collecting seventeen earlier cases); *United States v. Boesewetter*, 463 F.Supp. 370, 372 (D.D.C. 1978). Religious solicitation by the Seventh Day Adventist sect, *Espinosa v. Rusk*, No. CIV 78-915-B (D.N.Mex. March 22, 1979), and non-denominational evangelists, *Heritage Village Church and Missionary Fellowship v. North Carolina, supra*, as well as of course the activities of the Jehovah's Witnesses, have also been held to be constitutionally protected.

Indeed, a contrary conclusion would be inconsistent with the pragmatic necessities of freedom of expression. The relationship between financial resources and expression was squarely recognized in the political arena by *Buckley v. Valeo*, 424 U.S. 1 (1976).

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation

> costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.
>
> The expenditure limitations contained in the [Federal Election campaign] Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech.

Id. at 19 (footnote omitted).

The same financial reality inescapably exists for religious expression as well. Pamphlets,[3] magazines,[4] books,[5] phonograph records,[6] lecture halls,[7] and television broadcast time,[8] all cost money. The ability to proselytize and to communicate religious concepts and doctrines is dependent upon money. To the extent that the ability of churches to raise funds is restricted, their ability to spread their gospel is restricted just as the limitation in permissible expenditure limited political expression in *Buckley*.

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[3]*See Schneider v. New Jersey*, 308 U.S. 147 (1939) (leafletting by Jehovah's Witnesses).

[4]*See ISKCON v. Conlisk*, 374 F.Supp. 1010 (N.D. Ill. 1973) (magazine distribution by Hare Krishna sect).

[5]*See Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (book distribution by Jehovah's Witnesses).

[6]*See Cantwell v. Connecticut*, 310 U.S. 296 (1940) (use of phonograph record in connection with solicitation by Jehovah's Witnesses).

[7]*See Terminiello v. City of Chicago*, 337 U.S. 1 (1948) (speech given in lecture hall by suspended Catholic priest).

[8]*See Heritage Village Church and Missionary Fellowship, Inc. v. North Carolina*, 253 S.E.2d 473 (N.C. Ct. App. 1979) (solicitation to support religious broadcasting).

Besides the general relationship of finances to free and effective expression found crucial in *Buckley*, there is a further relationship between finances and the free exercise of religion. Just as the means of expression require financing, so also do the means of worship. Churches, temples, ministers, priests, vestments, and sacraments (not to mention such mundane expenses as insurance, fuel, and maintenance) do not come free. In order to defray these costs and to be able to worship, a church must be able to seek financial support. Many churches seek support from their own members, and their right to do so would never be questioned. *See Murdock v. Pennsylvania, supra* at 111 ("the passing of the collection plate" viewed as paradigm religious activity). But a new, struggling religious movement would be strangled at its birth if it were restricted to only this avenue of support since, by definition, it would not have the membership from which to draw support.[9]

Consequently, if religious solicitation were not expression fully protected by the first amendment to at least the same degree as is solicitation for political

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[9]For example, the fledgling International Society for Krishna Consciousness found itself in precisely this position a few years ago.

> Evidence also presented by plaintiffs revealed that they are struggling economically as a new religion and that the majority of monies obtained by the group are a result of requested contributions while handing out religious literature. These monies are used to purchase more religious literature to hand out and to support the local Temple in New Orleans.

ISKCON v. City of New Orleans, 347 F.Supp. 945, 947 (E.D. La. 1972). For a scholarly description of this sect, see J. Judah, *Hare Krishna and the Counterculture* (1974).

causes,[10] existing churches with large and prosperous current memberships could be afforded a preferred status, free from competition by new, vigorous religious movements, whose growth would be effectively stifled by restrictions on public solicitation of funds for their support.

This result would be plainly inconsistent with the command of the religion clauses of the first amendment. "[T]he basic purpose [of the religion clauses] . . . is to ensure that no religion be sponsored or favored, none commanded, and *none inhibited*." *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970) (emphasis added). "The First Amendment mandates governmental

[10] *Amicus* does not dispute, of course, as the Court has several times recognized in dictum, that a municipality may require a person, "before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent," *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940); *accord*, *Hynes v. Mayor of Oradell*, 425 U.S. 610, 618-19 (1976); *Martin v. City of Struthers*, 319 U.S. 141, 148 n.14 (1943), a restriction which may not be permissible where only "pure" expression of ideas is at issue. *See Hynes v. Mayor of Oradell*, *supra* at 628 n.4 (Brennan, J., concurring); *Thomas v. Collins*, 323 U.S. 516, 540 (1945). Apart from this possible distinction, however, the Court has apparently never placed any greater restriction on political or religious solicitations than it has on political or religious "pure" speech. *Compare, e.g., Cantwell v. Connecticut, supra* at 306-07 (state may regulate "time and manner of solicitation"), *with, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (state may impose "reasonable 'time, place and manner' regulations" on speech). Indeed, *Cantwell* emphasized that a regulation which "unreasonably obstruct[s] or delay[s] *the collection of funds*" cannot be upheld. *Cantwell v. Connecticut, supra* at 305 (emphasis added). Accordingly, since devices such as the 75% limitation imposed by Schaumburg, Ill., Code §22-20(g) (1974), which may act arbitrarily to prevent religious or political solicitation in the first instance, go far beyond any "reasonable registration or identification requirement," *Thomas v. Collins, supra* at 540, restrictions such as these must be measured by the strictest standards.

neutrality between religion and religion. . . ." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). In sum, "indirect coercive pressures upon religious minorities to conform to officially-approved religion . . ." violate the religion clauses. *Engel v. Vitale*, 370 U.S. 421, 431 (1962). *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) (effect of compulsory education upon the Amish); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (second prong of general establishment clause test is effect of enactment); *Sherbert v. Verner*, 374 U.S. 398 (1963) (effect of work requirement on Sabbatarian).

Thus on the basis of both logic and precedent, religious solicitation is fully protected expression. The Schaumburg ordinance should therefore be subjected to the most exacting first amendment scrutiny, since it can be, and indeed has been, interpreted to include religious solicitation within its scope.

III.

THE PERCENTAGE LIMITATION RESTRICTS RELIGIOUS SOLICITATION WITHOUT SERVING A COMPELLING STATE INTEREST AND IS THEREFORE UNCONSTITUTIONAL.

In light of the protected nature of religious expression, the unconstitutionality of the percentage limitation, Schaumburg, Ill., Code §22-20(g) (1974) is readily apparent. Schaumburg, in effect, is attempting to limit the right to solicit to only those churches or charities which are "efficient" by the Village's own definition. But as to a religion, at least, the cost of conducting the solicitation may not constitutionally be inquired into by Schaumburg.

This truth was recognized long ago by Justice Henshaw of the California Supreme Court. A Los Angeles ordinance had required all charities, including those operated by churches, to obtain a permit to solicit contributions. It was applied to the activities of the Salvation Army, which was unable to obtain a permit because it could not meet a statutorily prescribed "reasonable standard of efficiency." *In re Dart*, 172 Cal. 47, 53, 155 P. 63 (1916). After holding that the ordinance unconstitutionally delegated a standardless licensing authority to the licensing commission, the opinion noted that

> there is another aspect of the question clearly presented, and as clearly demanding consideration. This is the religious aspect. . . . [D]oes it demand discussion to establish so plain a truth as that touching religion there is a doubtful zone which legislation should be most reluctant to enter? The founders of the nation recognized it when they placed the great guaranty of religious liberty in the constitution of a free people, and it is for every court to see that the liberty is not encroached upon and that freedom gnawed and impaired by any experimental legislation however well meant. So when legislation does enter that uncertain domain, the fact that it is there must bring to it condemnation. In accordance with the dictate of the constitution itself the doubt will be resolved in favor of religious liberty. And it will be found better in the long run that the free exercise of religion be preserved in its integrity, better for the nation, better for charity itself which owes so much to religion, even if the efficiency of religious charities be not up to

> the standard of perfection set by the Municipal Charities Commission. If, under that standard, seventy-five cents of every dollar would go to the objects of charity, while under the less efficient methods in vogue but fifty cents of each dollar actually reaches the beneficiaries, it is not to be forgotten that *there will be many millions fewer of these dollars to be distributed in charity if the activities of the religious are hampered, thwarted, and stayed.*

Id. at 55-56 (emphasis added).

Since the Schaumburg ordinance does or at least could apply to even solicitation of contributions by religious groups for religious purposes, see Section II *supra*, the reasoning of *Dart* is all the more persuasive. If the costs of a religious solicitor are fifty cents on the dollar, there will still be many dollars collected that will support the free exercise of the religion. The cost of the fundraising is of no moment to the state. The state has no more authority to direct the allocation of resources of a church than it does to control church government or to resolve property disputes within the church. *See Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871); *cf. Jones v. Wolf*, 47 U.S.L.W. 4962 (U.S. July 2, 1979) (neutral principles required).[11]

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[11]The application of the percentage limitation to a church might well result in a violation of the establishment clause, as well, through a prohibited entanglement. *See New York v. Cathedral Academy*, 434 U.S. 125 (1977); *Lemon v.*

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Moreover, as this Court has implicitly recognized, because of the protected nature of religious solicitation as expression, only regulation "which does not unreasonably obstruct or delay the collection of funds . . ." may be constitutional.[12] The percentage limitation fails to meet this standard because it completely prevents the collection of funds for any organization which cannot comply. No account is taken of the reasons why the church may not be able to comply, whether they are beyond its control (legal expenses, for instance, *see* Schaumburg, Ill., Code §22-20(a)(2) (1974), caused by arbitrary permit refusals) or whether they are compelled by religious belief (high "salaries", *see*

Kurtzman, 411 U.S. 192 (1973) *("Lemon II"); Lemon v. Kurtzman*, 403 U.S. 602 (1971) *("Lemon I")*.

The entanglement which results from the Schaumburg ordinance arises from its attempt to determine the "cost" of a charitable solicitation in order to determine whether "at least seventy-five percent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization". Schaumburg, Ill., Code §22-20(g) (1974). The Unification Church, for instance, encourages its followers to venture forth as missionaries, spreading religious truth, and supports them in that activity. The cost of the evangelistic activities is therefore both a "cost" of raising money for the church and also the very essence of a religion composed of itinerant preachers. Schaumburg has no standard by which to apportion funds raised or spent between these two inseparable categories. The same would be true for television worship services which make an appeal for financial support. *See Heritage Village Church and Missionary Fellowship, Inc. v. North Carolina*, 253 S.E.2d 473 (N.C. Ct. App. 1979). But if Schaumburg were even to attempt such a weighing process, it would be forced to evaluate the legitimacy of a church's religious beliefs in order to determine the relative values of these functions to a religious enterprise. This is, of course, a prohibited activity. *United States v. Ballard*, 322 U.S. 78 (1944).

[12]"The clear inference to be drawn from the above quoted statement in *Cantwell v. Connecticut*, is that if a statute *does* unreasonably obstruct and delay the collection of funds, it is open to constitutional attack." *Cherris v. Amundson*, 460 F.Supp. 326, 328 (E.D. La. 1978) (emphasis added).

id., for example, for hierarchical leaders). This partial censorship of protected expression, see Section II *supra*, is therefore blatantly unconstitutional.

Nor can the percentage restriction be supported by the existence of a compelling state interest. Privacy cannot be asserted to be an interest protected by the percentage limitation for the simple reason that solicitors who comply with the percentage restriction or non-solicitors who might also use the public street or call from door-to-door would have an identical impact upon the privacy of the citizens. When Schaumburg permits equally intrusive methods of communication to occur, its interest in privacy "is difficult to take very seriously. . . ." *Smith v. Daily Mail Publishing Co.*, 47 U.S.L.W. 4824, 4827 (U.S. June 26, 1979) (Rehnquist, J., concurring).

Nor is an interest in prevention of fraud a sufficient state interest to justify suppression of expression. "Certainly penal laws are available to punish such conduct." *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940). Even if a prior restraint may ever be used to police against fraud, the percentage limitation is an overbroad and arbitrary means of achieving this end. The ordinance assumes that any organization which spends 25.1% of its proceeds on the costs of solicitation is "fraudulent," or at least "commercial", while one which spends 24.9% of its proceeds on these costs is not. The assumption is arbitrary at best and actually irrational in a case, for example, where no funds are retained by the organization or its officers but instead are all spent in good faith for fundraising expenses such as rents and advertising. The flat percentage limitation is a far cry from the "narrow specificity" necessary

when first amendment rights are at stake. *NAACP v. Button*, 371 U.S. 415, 433 (1963).[13]

IV.

THE CHARITABLE SOLICITATION ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT VESTS DISCRETION IN OFFICIALS TO GRANT OR TO DENY LICENSES FOR THE EXERCISE OF FIRST AMENDMENT RIGHTS WITHOUT PROVIDING NARROW AND OBJECTIVE STANDARDS TO GUIDE THE DISCRETION.

The first amendment requires that laws which operate as prior restraints contain narrow, objective, and definite standards to guide the licensing authority. This principle has long been recognized as vitally important to the system of freedom of expression.

> The reasoning has been, simply, that *the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use*. Our distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law.

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975) (emphasis added).

One of the earliest overbroad licensing law cases, particularly relevant here because it also involved religious and charitable solicitation, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), held unconstitutional a licensing law that required a public official to make a judgmental assessment of whether a specific religious solicitation campaign posed a threat of fraud to the community. This Court was particularly concerned that the official "is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion." *Id.* at 305.

The Court's most recent decision in this area is *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), which concerned an ordinance regulating the activities of persons " 'desiring to canvass, solicit or call from house to house' . . . ." *Id.* at 611. In form, the *Hynes* ordinance did not explicitly require a person to obtain prior permission for the activity, but he was required first to "identify" himself to the police. Nonetheless, the Court held the ordinance invalid. The Chief Justice observed that

> [t]o the extent that the ambiguities and the failure to explain what "identification" is required give police the *effective* power to grant or deny permission to canvass for political causes, the ordinance suffers in its practical effect from the vice condemned in *Lovell, Schneider, Cantwell, and Staub*.

Id. (emphasis in the original).[14]

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[13]For this reason, the lower courts, as well as the court below, which have recently considered percentage limitations in the context of religious and political solicitation, as opposed to purely charitable solicitation in the traditional sense of the term, have unanimously held them to be unconstitutional. *Carolina Action v. Pickard*, 465 F.Supp. 576, 581-82 (W.D.N.C. 1979) (political solicitation); *id.*, 420 F.Supp. 310, 311 (1976) (preliminary injunction); *Fernandes v. Limmer*, 465 F.Supp. 493, 504-05 (N.D. Tex. 1979) (religious solicitation); *Heritage Village Church and Missionary Fellowship, Inc. v. North Carolina*, 253 S.E.2d 473, 485-86 (N.C. Ct. App. 1979) (same).

[14]In an action brought by members of the Unification Church, this Court's forty years of case law on standardless licensing laws were recently synthesized by Judge O'Connor of the District of Kansas. Referring to the kind of standards which may permissibly be applied by a public official who

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The present ordinance contains elements of both the features held invalid in the licensing cases cited by *Hynes*, namely, *Cantwell v. Connecticut, supra; Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Schneider v. New Jersey*, 308 U.S. 147 (1939); and *Staub v. City of Baxley*, 355 U.S. 313 (1958), and the feature found invalid in *Hynes* itself. Like the ordinances in the former cases, the Schaumburg enactment specifically requires a prior submission to the licensing authority and its approval of that submission in the form of the issuance of a permit before the regulated activities may be undertaken.[15] Moreover, as in *Cantwell*, such prior approval "involves appraisal of facts, the exercise of judgment and the formation of an opinion," since a permit may issue only "[i]f the village board shall find and determine that all requirements of this article have been met. . . ." Schaumburg, Ill., Code §22-21 (1974).

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decides upon a permit application for church solicitation, Judge O'Connor wrote that

> the standards must be more than mere criteria or guidelines; they must be complete in and of themselves, and leave no factors to be assessed, judgments to be made, or discretion to be exercised by the appropriate licensing official. In other words, *the decision to grant or deny the license application must be virtually a ministerial one.*

Swearson v. Meyers, 455 F.Supp. 88, 91 (D. Kan. 1978) (emphasis in the original). Judge O'Connor's opinion was, in turn, specifically quoted and relied upon by Judge Renfrew in another action brought by Unification Church members. *Hall v. McNamara*, 456 F.Supp. 245, 247 (N.D. Cal. 1978).

[15]Schaumburg, Ill., Code §22-21 (1974) provides as follows:

> All applications shall be submitted to the village clerk and shall be verified under oath by a responsible officer of the soliciting organization. All completed applications shall be submitted by the village clerk to the village board. If the village board shall find and determine that all requirements of this article have been met, a permit shall be issued specifying the dates and times at which solicitation shall take place.

Moreover, although the ordinance does not in so many words impart a grant of discretion to the village board, it is, in light of *Hynes*, nevertheless facially unconstitutional. *Hynes* teaches that vague and ambiguous terms even in a mere registration system regulating the exercise of first amendment rights create "an *effective* power to grant or deny permission" for the exercise of those rights. *Hynes v. Mayor of Oradell, supra* at 622 (emphasis in the original).

Hynes sets out the yardstick against which precision of language in an enactment such as this is to be measured.

> The general test of vagueness applies with particular force in review of laws dealing with speech. "[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

Hynes v. Mayor of Oradell, supra at 620. The present ordinance of the Village of Schaumbug woefully fails the test adumbrated in *Hynes*.

First, as in *Hynes*, "the coverage of the ordinance is unclear. . . ." *Id.* at 621. The ordinance provides that every "charitable organization" must apply for a permit. Schaumburg, Ill., Code §22-20 (1974). But the purported definition of what constitutes a "charitable organization", in what appears to be an attempt to be all-inclusive, leaves at least those organizations which are not traditionally considered to be "charities" at a loss to determine whether or not they must apply for a permit.

If such an organization, a church for example, deems itself to be beyond the coverage of the ordinance, and engages in solicitation without applying for a permit under the ordinance, it does so at the peril of a later decision by the Village that it was indeed covered, thereby leaving its members open to criminal prosecution. This result, of course, is precisely the feature condemned in *Hynes*, that, "with respect to the coverage of the ordinance, this law 'may trap the innocent by not providing fair warning.' *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)." *Id.* at 622.

A "charitable organization" is defined by the ordinance as "[a]ny benevolent, philanthropic, patriotic, not-for-profit, or eleemosynary group, association or corporation . . . which solicits or collects funds for charitable purposes." Schaumburg, Ill., Code §22-19 (1974). A "benevolent" organization is one which is "marked by a kindly disposition to promote the happiness or prosperity of others. . . . [or] prompted by motives of charity. . . ." *Webster's Third New International Dictionary* 204 (1976). A "philanthropic" organization is one which is "characterized" by "goodwill toward one's fellowmen [especially] as expressed through active efforts to promote human welfare." *Id.* at 1697. A "patriotic" organization is one which is "actuated by love of one's country." *Id.* at 1656. And an "eleemosynary" organization is simply one which is "charitable." *Id.* at 733. Thus, all the definitions of a charitable organization (except possibly patriotic) are merely synonyms which, in substance, mean little, if anything, more than "charitable".[16] Consequently, a "charitable organization" within the meaning of the

[16]The complete dictionary definitions of the terms used in the Schaumburg ordinance are reproduced as Appendix B.

Schaumburg ordinance reduces merely to one which solicits and collects funds for charitable purposes.[17]

A "charitable purpose", however, is defined as "[a]ny charitable, benevolent, philanthropic, patriotic, or eleemosynary purpose". Schaumburg, Ill., Code §22-19 (1974). The attempted definitions of a charitable organization prove thus to be entirely circular. A "charitable organization" and a "charitable purpose" are both defined by means of several adjectives, all of which mean "charitable". And charity, at most, consists of giving help to those in need or to worthy causes. *See Webster's Third New International Dictionary, supra* at 378.

What constitutes a "charity", therefore, cannot be determined without an "appraisal of facts, the exercise of judgment, and the formation of an opinion." *Cantwell v. Connecticut, supra* at 305. A group which seeks money in order to promote a political candidate to run for office would not be likely to think of its cause as "charitable", but Schaumburg could well decide that giving money to aid a political candidate, especially a poor one, is an act of charity. However, the right

[17]The inclusion of the term "not-for-profit" in the definition of a charitable organization, Schaumburg, Ill., Code §22-19 (1974), does not lend the ordinance any greater precision which would save the scope of its coverage from being unconstitutionally vague. If *any* not-for-profit organization must obtain a permit pursuant to the ordinance and therefore comply with the percentage limitation in order to solicit contributions within Schaumburg, then the ordinance would restrict the ability of even political parties to solicit financial contributions and would consequently be undeniably overbroad. *See Buckley v. Valeo*, 424 U.S. 1 (1976). If, as seems more likely, "not-for-profit" merely modifies the other terms of the definition and requires an organization which is *both* charitable in some other sense and not-for-profit to obtain a permit and to comply with the limitation, then it adds nothing to the meaning of the other terms, which define charitable organizations by reference to their purpose.

of an independent group to raise and spend money on behalf of a candidate is protected by the first amendment and most likely could not be restrained by the 75% requirement in any event. *See Buckley v. Valeo,* 424 U.S. 1, 44-51 (1976).

Even if Schaumburg were to disclaim any such application to electoral advocacy, the problem would still remain. If Jane Fonda asks for donations to aid the victims of American imperialism or if Ronald Reagan asks for aid for the victims of Communist aggression, the political nature of the appeal remains even though the appeal now has an arguably charitable character as well. Requests for donations for even the most elementary human needs of food and shelter for civilians on one side of an armed conflict, while resembling traditional charity, may also be, and often are, requests for political contributions to the cause for which that group is fighting. Would the Irish Northern Aid Committee, currently, or the group which sailed medicine to North Viet Nam during the Indo-Chinese conflict, be covered by the ordinance as "charitable" organizations? Perhaps, but perhaps not. The simple point is that no group that solicits money for any political reason can tell whether or not it must apply for a permit as a charitable organization.

Similarly, one would not expect a religious purpose to be considered as "charitable". "Donate to help propagate my creed" is different in function and nature from "donate to help feed the starving poor", but religious corporations and religious bequests have traditionally been treated as functionally equivalent to their charitable counterparts. Schaumburg then could well decide to interpret "charitable" solicitation to include

religious solicitation; but whether or not it has done so is left to guesswork.

Moreover, religious and charitable goals are often inextricably intertwined, for example, a skid row mission which preaches and converts as well as feeds and houses. Whether such an organization is charitable and required to seek a permit cannot be ascertained from the ordinance. Nor can the necessity for a permit be ascertained if religious, political *and* charitable purposes are combined, for example, in a church's appeal for aid to the guerillas and their dependents fighting in Zimbabwe-Rhodesia.

Examples could be multiplied. Are educational appeals charitable? What of an appeal to popularize an idea, such as astrology or vegetarianism? Does the result differ if the idea contemplates political action, for example, prohibition?

Even if any charitable component is enough to bring an organization within the scope of the ordinance, whether "strictly" religious or political organizations would require a permit is still fatally unclear. In the court below Schaumburg argued

> that religious and political organizations are not under sections 22-19 through 22-24 because they are not specifically enumerated in section 22-19. *This is certainly not apparent on the face of the provision;* indeed it seems inconsistent with the broad definition employed. Village counsel admits that inclusion of religious organizations probably would result in impairment of the First Amendment freedoms of such organizations.

Citizens for a Better Environment v. Village of Schaumburg, 590 F.2d 220, 224 n. 5 (7th Cir. 1978) (emphasis added).

However, perhaps the most dramatic evidence of the vagueness of the ordinance's coverage is the fact that despite the explicit representations of the Village's counsel noted by the Seventh Circuit, it has been applied by Schaumburg to the purely religious solicitations of members of the Unification Church. In *Hartman v. Village of Schaumburg*, No. 78 C 4427 (N.D. Ill., filed November 8, 1978), members of the Unification Church sought relief against application of the Schaumburg ordinance to their religious solicitation activities, after the Village had arrested and threatened with future arrests church members engaged in such expression. An ordinance which can be construed to mean one thing one day and another thing the next as it suits municipal convenience is vague virtually by definition.

In sum, what constitutes a "charitable organization" required to obtain a permit is not defined by the ordinance except in circular terms. And "charitable" has no clear meaning which would convey to those who may be subject to the ordinance whether their organization is indeed charitable or is religious, political, or something else not comprehended by it. In this respect, "charitable organization" is as vague as the term " 'Federal, State, County, or Municipal . . . *cause*' " held unconstitutionally vague in *Hynes v. Mayor of Oradell, supra* at 621 (emphasis in the original).

Further, as in *Hynes*, "the [Schaumburg] ordinance does not sufficiently specify what those within its reach must do in order to comply." *Id.* The permit applicant must provide the village board with "[a] written statement of *recent* date that the organization has complied with the provisions of . . . [the Illinois charitable solicitation act]." "Recent" is a relative term whose

meaning depends upon subject and context. Any application could be denied because the statement is not sufficiently "recent"—especially if the village board does not really believe that the organization is or should be classified as charitable because it is controversial or unpopular, or in other words, because of the ideas that it seeks to support.

Also, the permit applicant must provide "[*s*]*atisfactory* proof that the organization is a tax exempt organization under . . . [I.R.C. §503(c)]." Schaumburg, Ill., Code §22-20(f) (1974) (emphasis added). Even more than "recent," "satisfactory" is inherently subjective. Indeed, the courts have long recognized that no objective criteria are possible at all when a decision maker must be "satisfied". *See, e.g., Gibson v. Cranage*, 39 Mich. 49 (1878). Even if "satisfactory" means "reasonably satisfactory," *see, e.g., Mattei v. Hopper*, 51 Cal.2d 119, 123, 330 P.2d 625 (1958), the very fact that judgment must be exercised to determine whether that standard has been met is sufficient to show that the term is impermissibly vague in this context. *See Cantwell v. Connecticut, supra.*

A comparable term was also disapproved in *Hynes v. Mayor of Oradell, supra*, where this Court noted that the ordinance there at issue

> does not explain, for example, whether a "*recognized* charitable cause" means one recognized by the Internal Revenue Service as tax exempt, one recognized by some community agency, or one approved by some municipal official.

Id. at 621 (emphasis in the original).

The heart of the matter is that a power to decide what is "satisfactory" proof is an *effective* power to

deny a permit in the hands of an official who believes that the permit should be denied "in the best interest of the community". *See Smith v. City of Manchester,* 460 F.Supp. 30, 35 (E.D. Tenn. 1978) (exemption clause construed to be absolute prohibition of non-local religious solicitation to prevent Unification Church solicitation).

Similarly, the permit applicant must provide "[*s*]*atisfactory* proof that at least seventy-five per cent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization." Schaumburg, Ill., Code §22-20(g) (1974) (emphasis added). The possibilities for discretionary determinations are even greater under this provision than under the former one because the salaries of solicitors and administrative expenses of the organization may not be deemed to be used for its charitable purposes. *Id.* at §§22-20(g)(1), (2). The village board can well decide that the organization's budget had not been "satisfactorily" stated to exclude these prohibited items if it disapproves of its system of accounting, if it is simply unfamiliar with accounting standards, if it fails to understand or fails to agree with the accountant's judgment, or if it simply dislikes the organization.[18]

The exclusion of salaries paid to solicitors from the calculation of the percentage of proceeds used for the charitable purposes is also vague in the context of religious solicitation. Schaumburg, Ill., Code §22-20(g)(1) (1974). The Unification Church, for instance, encourages its followers to venture forth in the world

[18]*See, e.g., Cherris v. Amundson,* 460 F.Supp. 326, 329 (E.D. La. 1978) (extensive information required in permit ordinance allowed official sufficient authority to evaluate beliefs, practices, and operations of Unification Church and unconstitutionally deny permit thereon).

as missionaries spreading religious truth as they see it and soliciting financial support as they go. The basic necessities of life for these missionaries are provided by the church, not as salaries, not as commission, but instead as stipends that allow them to pursue their mission. The cost of supporting these missionaries is therefore a part of the "charitable" purpose of the church, since that purpose is to convey its message to the world, but Schaumburg may well interpret these support costs as "salaries."

Finally, the application for a permit must be submitted "by a *responsible* officer of the soliciting organization." Schaumburg, Ill., Code §22-21 (1974) (emphasis added). Just as with "recent" date, the village board is entirely free to decide for itself which officers of the corporation are "responsible", and it is free to inform an applicant after the fact that his application was not submitted by a "responsible" officer and was therefore denied.

All of these vague terms are on a par with the term "identification" held vague in *Hynes.* Just as the canvasser in *Hynes* could not predict what the police chief would consider to be sufficient identification, the solicitor here cannot predict what constitutes a "recent" date, "satisfactory" proof, or "responsible" officer. The lack of precision in the terms used by Schaumburg in its application process would easily allow, for example, indefinitely continued rejections of any given application for lack of compliance, where only the village board itself "knew" the "correct" answer to a particular item. Consequently, as in *Hynes,* the village board possesses an *effective* power of censorship through the power to interpret these vague terms to

suit its own purposes, and the ordinance accordingly violates the first amendment.

Moreover, the proper role of this Court is not to supply standards, to interpret, or narrowly to construe these vague terms. Where vagueness and consequent overbroad discretion appear in a first amendment licensing law, the Court's function is narrow and does not consist of creating standards. This Court has specifically renounced any greater power.

> Even assuming that a more explicit limiting interpretation of the ordinance could remedy the flaws that have been pointed out—a matter on which we intimate no view, we are without power to remedy the defects by giving the ordinance constitutionally precise content.

Hynes v. Mayor of Oradell, supra at 622.

There is a compelling reason for this requirement of judicial restraint. For a federal court to reach out to construe and interpret state laws would be inconsistent with basic notions of federalism and comity.

> The federal court may not apply its own narrowing construction and then find the statute as construed not overbroad. . . . There are good reasons for forbidding this. Even though the federal court cannot abstain, it must, in what it decides and how it decides, continue to respect the policies which underlie comity and federalism. We must give appropriate regard to the State's right to conduct its own affairs, including construing its own statute, so long as done within constitutional limits.

Hunter v. Allen, 422 F.2d 1158, 1165 (5th Cir. 1970). *Cf. Younger v. Harris*, 401 U.S. 37 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) (abstention doctrines). *See also Winters v. New York*, 333 U.S. 507 (1948); *Murdock v. Mayor of Memphis*, 87 U.S. (20 Wall.) 590 (1875) (Supreme Court has no power to review state construction of its own laws).[19]

V.

THE CHARITABLE SOLICITATION ORDINANCE IS UNCONSTITUTIONAL BECAUSE IT LACKS FIRST AMENDMENT DUE PROCESS PROCEDURAL SAFEGUARDS MANDATED BY FREEDMAN v. MARYLAND.

The Schaumburg ordinance is facially unconstitutional because it lacks vital safeguards that would assure a permit applicant procedural due process. Laws requiring a license or other official permission as a condition to engaging in first amendment expression must pro-

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[19]Another reason that this court may not supply the necessary standards to cure the manifest vagueness of this ordinance is that to do so would require legislative power which a federal court, at least when considering state and local enactments, does not possess. "In the instant case, if this court were to create the missing standards out of whole cloth, it would be engaging in a function properly left to lawmakers." *Shifrin v. Wilson*, 412 F.Supp. 1282, 1293 (D.D.C. 1976). In other words, "to supply a missing term in the ordinance . . . is a matter calling for legislative enactment which the courts are powerless to supply". *Naprstek v. City of Norwich*, 545 F.2d 815, 818 (2d Cir. 1976). *Accord, e.g., Swearson v. Meyers, supra* at 93; *ISKCON v. Englehardt*, 425 F.Supp. 176, 181 (W.D. Mo. 1977); *see, e.g., United States v. Robel*, 389 U.S. 258, 267-68 (1967); *cf. People v. Fogelson*, 21 Cal.3d 158, 167, 577 P.2d 677, 145 Cal.Rptr. 542 (1978) (state supreme court refused to "undertake the essentially legislative task of specifying which of the legitimate municipal interests in regulating solicitation are to be included in permit conditions, nor how such conditions might be drafted").

vide for the four-fold procedural safeguards articulated in *Freedman v. Maryland*, 380 U.S. 51, 59 (1965). (1) The licensor must grant or deny the permit within the briefest possible time and that time must be specified in the statute. (2) If permission is denied or revoked, the statute must require the licensor to institute within a specified brief time period proceedings for a temporary and permanent injunction to restrain the proposed expression, and to assume the burden of proof in such judicial proceedings. (3) Any restraint imposed in advance of a final judicial determination on the merits must be limited by the statute to preservation of the status quo for the shortest possible fixed period. (4) A prompt final judicial decision must be assured. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367 (1971); *Blount v. Rizzi*, 402 U.S. 421 (1971); *Teitel Film Corp. v. Cusack*, 390 U.S. 141-42 (1968).[20]

Whatever doubt may have once existed about the scope of the requirements developed in *Freedman* in the context of motion picture censorship was put to rest by *Southeastern Promotions, Ltd. v. Conrad, supra.* In the course of the opinion, the Court restated and affirmed the rule of *Freedman* and applied it in the broader context of speech in a public forum.

> The settled rule is that a system of prior restraint avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system. . . . If a scheme that restricts access to the mails must

[20]*See generally* Monaghan, First Amendment Due Process, 83 Harv. L. Rev. 518 (1970); Blasi, *Prior Restraints on Demonstrations*, 68 Mich. L. Rev. 1481 (1970).

> furnish the procedural safeguards set forth in *Freedman, no less must be expected of a system that regulates use of a public forum.* Respondents here had the same powers of licensing and censorship exercised by postal officials in *Blount*, and by boards and officials in other cases.

Id. at 559-61 (emphasis supplied).[21]

The central role of political and religious speech in the system of freedom of expression logically requires that it be given no less due process protection than is afforded to other forms of expression. Justice Harlan recognized this requirement a decade ago in the context of an analogous ordinance which required a permit to parade upon the public streets.

> The *Freedman* principle is applicable here. The right to assemble peaceably to voice political protest is at least as basic as the right to exhibit a motion picture which may have some aesthetic value.

Shuttlesworth v. City of Birmingham, 394 U.S. 147, 162 (1969) (Harlan, J., concurring) (footnote omitted).[22]

[21]The commentators have noted the development of this Court's cases extending the *Freedman* principles to administrative restraints on speech in general. "Every indication seems to be that the *Freedman* standards have become general norms to be applied by the courts in all administrative prior restraint situations." J. Barron & C. Dienes, *Handbook of Free Speech and Free Press* 60 (1979). "[Procedural] [o]verbreadth reasoning has also been used to invalidate schemes which failed to assure adequate judicial review of administrative acts affecting expressional activities." L. Tribe, *American Constitutional Law* §12-36 at 734 (1978).

[22]Solicitation of financial support for a political cause is included within protected political speech, and the right to solicit support for religious and charitable causes is no different

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In reaching this conclusion, Justice Harlan emphasized that the impact and effectiveness of speech relating to public affairs or appeals to the public for the support of a cause are almost as dependent upon their timing as upon their content.

> [S]low moving procedures have a much more severe impact in the instant case than they had in *Freedman*. Though a movie exhibitor might suffer some financial loss if he were obliged to wait for a year or two while the administrative and judicial mills ground out a result, it is nevertheless quite likely that the public would ultimately see the film. In contrast, *timing is of the essence* in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly, if it is to be considered at all.

Id. at 162-163 (emphasis added).[23]

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in principle. See Section ....., *supra*. "The Village admits that 'public interest' groups could come within the purview of section 22-19." *Citizens for a Better Environment v. Village of Schaumburg*, 590 F.2d 220, 225 (7th Cir. 1978). In view of this admission there can be no argument that the observations of Justice Harlan concerned a different variety of expression than that regulated by the Schaumburg ordinance.

[23]The opinion of the Court in *Shuttlesworth* appeared to accept this aspect of Mr. Justice Harlan's concurring opinion. The Court was willing to assume, *arguendo*, that after the "Supreme Court of Alabama [had] performed a remarkable job of plastic surgery upon the face of the [Birmingham] ordinance," *Shuttlesworth v. City of Birmingham*, 397 U.S. 147, 153 (1969), the ordinance "would pass constitutional muster." *Id.* at 155. In a footnote, however, the Court specified that its assumption of constitutionality presumed inclusion of adequate procedural safeguards.

> The validity of this assumption would depend upon, among other things, the availability of expeditious judicial review of the Commission's refusal of a permit.

Id. at 155 n.4.

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Timing is similarly often of the essence in charitable and religious solicitation and public persuasion. An appeal for aid for refugees of the civil war in Nicaragua, a compelling cause as this brief is written, will most likely be unnecessary when it is read. The Salvation Army and other evangelistic sects send their bell ringers out on the street at the Christmas season precisely because generous religious contributions can be anticipated then rather than during the remainder of the year. Therefore, in this context, as in first amendment jurisprudence in general, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).[24]

Indeed, four months prior to the *Shuttlesworth* decision, the Court had quoted *Freedman* and generalized its holding there to a prior restraint on speech in a public forum.

> [A] noncriminal process of prior restraints upon expression "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system."

Carroll v. President of Princess Anne, 393 U.S. 175, 181 (1968). There is no doubt, of course, that discretionary licensing systems regulating the exercise of rights protected by the first amendment constitute prior restraint and censorship in their "baldest form," *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). As noted in the text, if solidification of this principle were needed, it was supplied by the more recent *Southeastern Promotions* decision.

[24]Consequently, numerous recent decisions of the lower federal courts have held specifically that the *Freedman* procedural safeguards must be present in laws which purport to require official permission or authorization as a condition precedent to literature distribution or religious solicitation or both. *E.g., ISKCON v. Rochford*, 585 F.2d 263, 271-72 (7th Cir. 1978); *Fernandes v. Limmer*, 465 F.Supp. 493, 501-02 (N.D. Tex. 1979); *United States v. Silberman*, 464 F.Supp. 866, 873 (M.D. Fla. 1979); *ISKCON v. Griffin*, 437 F.Supp. 666, 671 (W.D. Pa. 1977). *See also ISKCON v. Bowen*, 456 F.Supp. 437, 443-44 (S.D. Ind. 1978), *aff'd*, No. 78-2278 (7th Cir. May 16, 1979).

Nothing in the Schaumburg ordinance places any time constraints whatsoever on the village board in acting on a permit application, much less by incorporating the stringent *Freedman* requirements. Thus, the board may, either by simple delay or by informing the applicant that his application is improperly drawn, act as a censor, effectively preventing the expression of doctrines or ideas it dislikes. Moreover, because it contains impermissibly vague terms (Section ...., *supra*), the ordinance creates an effective power to deny permits for the exercise of first amendment rights. The specter thus raised by the ordinance is precisely that which *Freedman* condemns and against which its specific safeguards were held to be required in the first instance. The *Freedman* due process requirements are necessary whenever a permit process creates even a *possibility* that a license will be denied. *ISKCON v. Rochford*, 585 F.2d 263, 271-72 (7th Cir. 1978).

However, even assuming *arguendo* that the ordinance does not grant discretion to deny a permit to an applicant who satisfies the 75% requirement, *Freedman* procedural safeguards are necessary nonetheless. None of the numerous cases which discuss and apply *Freedman* contain any intimation that its force is limited to discretionary licensing systems. In fact, this argument was specifically rejected by the Seventh Circuit in its recent decision involving the validity of a registration system for solicitation at O'Hare International Airport. "Even if the officials had *no* discretion in administering these regulations, due process would still require the inclusion of procedural safeguards." *ISKCON v. Rochford, supra* (emphasis added).

The basis for this conclusion is readily apparent. One of the many vices of any system of prior restraint

is the potential for the administrative official to "protect" the public by denying licenses to those of whom he disapproves. No matter what the language of the law or its apparent meaning, the official can construe the law subjectively and throw upon the permit applicant the burden of proving him wrong. Two recent cases brought by Unification Church members illustrate that this possibility is no mere chimera. In one, a provision which simply exempted local churches from the necessity of obtaining a permit for passing the collection plate was stood on its head by the responsible officials and construed to mean that only local churches could obtain permits because the city recorder had decided that denying a permit to non-local churches was "in the best interest of the community". *Smith v. City of Manchester*, 460 F.Supp. 30, 35 (E.D. Tenn. 1978). In another case, a police chief arrested religious solicitors for violation of a so-called "Green River" ordinance, even though, as the city attorney later conceded, the ordinance was "probably inapplicable" because they were not engaged in business. *Love v. Mayor of Cheyenne*, 448 F.Supp. 128, 131-32 (D. Wyo. 1978).

The *Freedman* procedures thus serve to avoid lawless conduct by a licensor as well as mistaken conduct. In either case, these procedural safeguards are necessary for the protection of fragile first amendment rights, since a delay in their exercise stifles expression no matter what the reason behind it. *See National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (injunction denies free speech pending review).

Not one of the four safeguards is included in the ordinance. No time limit, brief or otherwise, is specified as to the processing of permit applications; no require-

ment is included respecting judicial review; no limitation on a temporary restraint to preservation of the status quo during judicial review is included; and no prompt judicial review is assured or even contemplated.

Accordingly, for utter lack of *Freedman* due process procedure alone, the ordinance must be held unconstitutional. "No claim is made, or can there be, that the ordinance complies with the procedural requirements for prior censorship set forth in *Freedman v. Maryland* . . ." *Burton v. Municipal Court,* 68 Cal.2d 684, 695, 441 P.2d 281, 68 Cal.Rptr. 721, 728 (1968).

VI.

THE ORDINANCE CONTAINS IMPERMISSIBLE RESTRAINTS ON THE EXERCISE OF FIRST AMENDMENT RIGHTS.

In addition to the vagueness which creates an opportunity for censorship, the ordinance contains several other restrictions on solicitation. These regulations are not content-neutral. Rather the ordinance selects for regulation and consequent partial suppression a particular kind of speech, a solicitation "of any money or property of any kind or value", Schaumburg, Ill., Code §22-19 (1974), by a charitable organization (one which solicits and collects funds for a charitable purpose). Consequently, since the ordinance involves censorship, only a compelling state interest is sufficient to justify the restrictions.

This stringent standard is at the very heart of the meaning of the first amendment. If the first amendment is to protect freedom of expression, censorship must be tolerated only in the most exceptional circumstances. Therefore, whether or not content restriction was intended, *e.g., Wooley v. Maynard,* 430 U.S. 705 (1977),

and whether or not the motive of the state is praiseworthy, *e.g., Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977), only the most persuasive demonstration of necessity is sufficient to contravene the command of the first amendment. The most thorough exposition of this principle appeared in a case in which the practice of patronage was shown to be tantamount to "coerced belief" and thus a censorial restriction of the belief and association aspects of freedom of expression. *Elrod v. Burns,* 427 U.S. 347, 355 (1976).

> It is firmly established that a significant impairment of first amendment rights must survive exacting scrutiny. . . . "This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct governmental action, but indirectly as an unintended but inevitable result of the government's conduct. . . ." *Buckley v. Valeo, supra,* 424 U.S. at 65. Thus encroachment "cannot be justified upon a mere showing of a legitimate state interest." *Kusper v. Pontikes,* 414 U.S. at 58. The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest. . . . Moreover, it is not enough that the means chosen in furtherance of the interest be rationally related to that end.

Id. at 362 (citations omitted).

Numerous other cases insist upon the demonstration of the existence of a compelling state interest in order to justify censorship. *See, e.g., First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Nebraska Press Association v. Stuart,* 427 U.S. 96 (1976);

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). "State action impinging on free speech and association will not be sustained unless the governmental interest asserted is compelling." *Talley v. California*, 362 U.S. 60, 66 (1960) (Harlan, J., concurring).[25]

A. The Prohibition of Solicitation by Convicted or Indicted Felons Is an Invalid Prior Restraint.

Under the charitable solicitation ordinance, a charitable organization may not "utilize as a solicitor any person who has been convicted of a felony or is presently under indictment for a felony". Schaumburg, Ill., Code §22-23 (1974). The rationale for this blacklisting of convicted and indicted[26] felons from exercise of first amendment rights is presumably that these persons are more likely than others to commit a criminal act in the course of solicitation of charitable contributions. But this Court has long insisted that violations of the law be deterred by the threat of criminal sanctions rather than by prior restraints on expression which

[25]*See also Wright v. Chief of Transit Police*, 558 F.2d 67, 68 n.1 (2nd Cir. 1977) (compelling state interest must support area ban); *United States v. Silberman*, 464 F.Supp. 866, 873 (M.D. Fla. 1979) (compelling interest must justify regulation of first amendment activities).

[26]The inclusion of persons who have been merely *indicted* for a felony multiplies the unconstitutionality of the provision as a whole and adds to the egregious nature of the suppression of first amendment rights explained in this section. Schaumburg has made an indictment the basis for forfeiture of first amendment rights even though prior proof of guilt beyond a reasonable doubt is the constitutional requisite for imposing punishment consistent with the due process clause. *See Jackson v. Virginia*, 47 U.S.L.W. 4883 (U.S. June 28, 1979); *In re Winship*, 397 U.S. 358 (1970).

silence both those who would abuse the exercise of this precious right and those who would not.

The classic exposition of this principle is *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). There a statute which provided for abatement as a public nuisance of a newspaper which had *already* published nine "malicious, scandalous, and defamatory" issues was held unconstitutional. Even though further outrageous issues could well be expected in the future, Mr. Chief Justice Hughes noted that

> [t]he fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

Id. at 720.

The same point was made by *Dejonge v. Oregon*, 299 U.S. 353, 364 (1937).

> These [first amendment] rights may be abused by using speech or press or assembly in order to incite violence or crime. The people through their Legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.

This principle was then specifically relied upon in a decision holding various standardless licensing ordinances (including a charitable solicitation ordinance) to be unconstitutional because they created a *possibility* of an unjustified prior restraint. The Court conceded

that fraudulent appeals may be made in the name of religion, but held nonetheless that

> [a] municipality cannot, for this reason, require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval. . . . Frauds may be denounced as offenses and punished by law. Trespass may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may import the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press.

Schneider v. New Jersey, 310 U.S. 147, 164 (1939).

The same point was soon repeated, again in the context of a standardless charitable solicitation ordinance.

> Nothing we have said is intended to even remotely imply that, under the cloak of a religion, persons may, with impunity, commit frauds upon the public. Certainly penal laws are available to punish such conduct.

Cantwell v. Connecticut, 310 U.S. 296, 306 (1940).

And *Kunz v. New York,* 340 U.S. 290 (1951), overturned a denial of a speaker's permit to an applicant who had abused his free expression privileges in the past.

> The Court below has mistakenly derived support for its conclusion from the evidence produced at the trial that appellant's religious meetings had, in the past, caused some disorder. There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence. "In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment." *Near v. Minnesota,* 283 U.S. 697 (1931). We do not express any opinion on the propriety of punitive remedies which the New York authorities may utilize.

The import of these decisions is that, when first amendment rights are at stake, an absolute prohibition of future expression based upon past misconduct is constitutionally impermissible.[27] The total prohibition

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[27]The lower courts have therefore invalidated disqualification provisions like the Schaumburg ordinance because they contravene the constitutional preference for subsequent punishment rather than prior restraints. For instance, the California Supreme Court has held that

> [t]o interpret the ordinance in this case to permit denial of a license because of a past conviction of violating Penal Code section 311.2 [obscenity] would do more than create a hazard to protected freedoms; it would suppress them altogether. The penalty for violating section 311.2 does not include a forfeiture of First Amendment rights, and the risk that criminal sanctions will be insufficient to deter future violations of that section cannot justify the county's attempted forfeiture of those rights on the theory that past violators are unfit to operate bookstores.

Perrine v. Municipal Court, 5 Cal.3d 565, 665, 488 P.2d 648, 97 Cal.Rptr. 320, 325 (1971), *cert. denied,* 404 U.S. 1038 (1972).

The most recent decision on this issue, *Natco Theatres, Inc. v. Ratner,* 463 F.Supp. 1124, 1129 (S.D.N.Y. 1979), relied upon *Perrine* and upon two similar state supreme court cases, *City of Seattle v. Bittner,* 81 Wash.2d 747, 505 P.2d 126 (1973) (denial of theater license if applicant or its officers had been convicted of a crime involving moral turpitude or fraud within ten years), and *Alexander v. City of St. Paul,* 303 Minn. 201, 227 N.W.2d 370 (1975) (rescission of a theater license if operator or the business' principals convicted of any of a number of crimes) to hold that

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of felons from charitable solicitation within Schaumburg therefore cannot be justified.

Even if the use of a prior restraint were ever a proper solution to a problem of possible criminality of solicitors, the identifying characteristic which triggers its application here, a felony conviction, is far too inexact and unreliable a predictive factor to achieve the goal of preventing criminal conduct. "The problem of prediction is the key to the doctrine of prior restraint." *ISKCON v. Kearnes,* 454 F.Supp. 116, 122 (E.D. Cal. 1978). Some convicted felons may well use the identity of a solicitor to commit further crimes, but many or most will not and will be wrongfully restrained from exercising their first amendment rights, while others who are not so restrained may commit crimes. As the California Supreme Court recognized, in the first amendment area one cannot assume that because a person has in the past violated a statute, he will violate it again. *Perrine v. Municipal Court,* 5 Cal.3d 665, 488 P.2d 648, 97 Cal.Rptr. 320 (1971), *cert. denied,* 404 U.S. 1038 (1972).[28] The highly

> [a] regulatory scheme under which a license necessary to the exercise of First Amendment rights may be denied or revoked because of a past conviction for any felony (and for certain misdemeanors), constitutes a system of prior restraint. Such a scheme is constitutionally suspect and subject to the closest scrutiny. . . . In such situations the appropriate remedy is not to inhibit the right to sell a book or exhibit a movie, but rather, where applicable, to prosecute for violation of the obscenity laws.

Natco Theatres, Inc. v. Ratner, supra at 1129-30.

[28]Indeed, compared to *Perrine,* the Schaumburg ordinance is almost a fortiori overbroad since the *Perrine* ordinance was limited to a violation of a statute which prohibited the very conduct which the prior restraint sought to prevent. Schaumburg, in contrast, has made conviction of *any* felony the basis for disqualification from the exercise of first amendment rights. For example, under the ordinance conviction for violation of 26 U.S.C. §2740 (Supp. 1979) (speculation in sugar by official with sugar regulatory authority) is made the basis for a prediction that this person may commit a violent crime while soliciting donations for the Environmental Defense Fund or may embezzle from funds raised for the support of a religious mission. This presumption lacks even a rational basis, *see, e.g., Cleveland Board of Education v. LaFleur,* 414 U.S. 633 (1974), let alone the extreme reliability that would be necessary to justify a prior restraint.

speculative nature of the prediction of criminal activity is, therefore, an insufficient justification to restrict freedom of expression, notwithstanding the undeniable value of crime prevention. *See Nebraska Press Association v. Stuart,* 427 U.S. 539, 562 (1976); *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971) (prior restraints bear heavy burden of justification).

In sum, whether or not an applicant has engaged in improper or even unlawful activity in the past, he may not *ipso facto* be forever precluded from engaging in activity protected by the first amendment in the future. "We are here concerned with suppression —not punishment." *Kunz v. New York,* 340 U.S. 290, 295 (1951). Consequently, denial of a permit on any grounds of past misconduct constitutes "a classic instance of impermissible overbreadth", *People v. Taub,* 37 N.Y.2d 530, 337 N.E.2d 754, 757, 375 N.Y.S. 2d 303 (1975), because "a free society prefers to punish the few who abuse rights of speech after they break the law rather than to throttle them and all others beforehand". *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 559 (1975).

B. Exaction of a Flat Fee From Solicitors Burdens Expression and Is Therefore Unconstitutional.

The *Schaumburg* regulatory scheme requires payment of a nonrefundable ten dollar fee. Schaumburg, Ill., Code §22-22 (1974). The amount of this exaction

may appear to be nominal, but a large fee may be imposed as easily as a small one, thus suppressing freedom of expression. Therefore, whatever the amount of this fee or tax, long-established constitutional principle leaves no doubt that it is unconstitutional.

Just such a flat licensing tax for canvassing or soliciting was made the condition for license in *Murdock v. Pennsylvania,* 319 U.S. 105 (1943). A conviction for violating the license requirement was reversed because the imposition of the tax as a prerequisite for obtaining the license was itself a restriction of freedom of expression which rendered the license scheme invalid on its face.

The constitutional vice of taxes of this nature is that they are directly imposed upon first amendment rights and may therefore be used to suppress or to selectively control their exercise.

> The tax imposed . . . is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. . . . Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. . . .
>
> Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation.

Id. at 112 (citation omitted).

Whether or not the taxes imposed are reasonable in their rates is irrelevant because they constitute prior restraints upon freedom of expression.

> That is almost uniformly recognized as the inherent vice and evil of this flat license tax. . . . [A] person cannot be compelled to purchase, through a license fee or a license tax, the privilege freely granted by the Constitution. So it may not be said that proof is lacking that these license taxes either separately or cumulatively have restricted or are likely to restrict petitioner's religious activities. On their face they are a restriction of the free exercise of those freedoms which are protected by the First Amendment.

Id. at 114 (footnote and citation omitted).

Cox v. New Hampshire, 312 U.S. 569 (1941), is not to the contrary. The ordinance considered in *Cox* "was applicable only 'to organized formations of persons using the highways. . .'" *Id.* at 575. The obvious advantage of the permit system was "to afford opportunity for proper policing" and to prevent conflicts between competing parades. *Id.* at 576. The ordinance was thus solely concerned with an activity which imposed upon the government direct costs of policing and of housekeeping and was tailored to compensate the government for these costs.

> "The charge," said the [New Hampshire supreme] court, "for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public ex-

> pense of policing the spectacle, compared with the slight expense of a less expensive and attractive parade or procession, to which the charge would be adjusted." The fee was held to be "not a revenue tax, but one to meet the expense incident to the administration of the Act and to maintenance of public order in the matter licensed."

Id. at 576-77 (quoting *State v. Cox*, 91 N.H. 137, 144, 16 A.2d 508, 513-14 (1948)). The holding of *Cox* was simply that "[t]here is nothing contrary to the constitution in the charging a fee *limited* to the purposes stated". *Id.* (emphasis added). In other words, when the exercise of first amendment rights imposes affirmative cost upon the government, the government may recoup at least part of that cost.

Read in this context, the *Cox* holding is both good sense and sound economics. An administrative fee may be required when the government provides goods or services on the assumption that a market system will assure their distribution in the most efficient possible manner. *See United States v. Kras*, 409 U.S. 434, 93 S.Ct. 631 (1973); Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

But here, Schaumburg does not provide any service. Instead it seeks to regulate for its own purposes and interests. A charitable solicitor does not create any special need for policing. That anything more than routine neighborhood police patrols would be necessary to deal with charitable solicitation is unlikely in the extreme. In any event, Schaumburg has made no attempt to correlate the fee with any police cost incurred. Even if some policing cost could be attributed to the

presence of solicitors, it would be no greater than that which would be created by the presence of a political canvasser who does not solicit contributions or an opinion pollster, neither of which Schaumburg has chosen to regulate or to subject to a licensing fee. Policing cost simply cannot, therefore, justify the Schaumburg charitable solicitation fee.

Nor does Schaumburg perform any housekeeping services, any content-neutral regulation of the use of the forum. As many groups may obtain permits as happen to qualify for them. No "systematic, consistent and just order of treatment" to secure the convenient use of a public forum by the speaker and the general public alike is mandated. Instead, Schaumburg seeks to license the exercise of a first amendment right in order to serve its own notions of the public interest. Since the public presumably is the beneficiary of the operation of the ordinance, then the public in all fairness should bear its cost. In sum, no service and no benefit is conferred upon the permit applicant of any kind, and by hypothesis no market for the governmental benefit could possibly exist. What Schaumburg has in fact done is to impose regulation of first amendment activities supposedly in the "public interest" and then attempt to transfer that cost to the group regulated.

The very existence of this financial exaction with no compensating benefit will prevent those individuals who are unable to comply with it from exercising their first amendment rights. *See Boddie v. Connecticut*, 401 U.S. 371 (1971). For this reason, a fee was rejected as a condition for exercising the right to vote upon reasoning that is directly analogous to the exercise of first amendment rights.

> It is argued that a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver's license, it can demand from all an equal poll tax for voting. But we must remember that the interest of the state, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored. . . . To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. *In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an "invidious" discrimination* that runs afoul of the Equal Protection Clause.

Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966) (emphasis added, footnote and citations omitted).

The same irrelevance of wealth to any legitimate governmental interest is present here. *Hull v. Petrillo,* 439 F.2d 1184, 1186 (2d Cir. 1971). The right to express opinions and to solicit support for a cause on the basis of those opinions is a fundamental right, as was the exercise of the ballot in *Harper,* and likewise it cannot be restricted except for the most compelling reasons. *Compare Buckley v. Valeo,* 429 U.S. 1 (1976), *with Harper v. Union Free School District No. 15,* 395 U.S. 621 (1969). Wealth is not germane to the ability to spread ideas and to garner support.

"[T]he process of qualifying candidates for a place on the ballot may not constitutionally be measured solely in dollars." *Lubin v. Pannish,* 415 U.S. 709, 716 (1974). Neither may the process by which groups or individuals qualify ideas for the consideration and attention of the public be measured by dollars.

Thus, only if the state provides services for which compensation would be fair under the rationale of *Cox* can it exact a fee for the exercise of first amendment rights. In the absence of such services, the Schaumburg exaction is a tax rather than a regulatory fee.[29] The tax is unconstitutional both because it could be used to deter the exercise of first amendment rights and because it will inevitably prevent those who cannot pay from exercising these rights. "Freedom of speech, freedom of the press, freedom of religion are available

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[29]Even if Schaumburg could constitutionally impose some fee for a permit for the exercise of first amendment rights under these circumstances, the fact that the fee bears no relationship to the cost of processing any particular application fatally impeaches it and reveals it to be a tax. The fee simply cannot be one which is incident to meeting the expense of administering the Schaumburg scheme if an application which has to be carefully evaluated and investigated by the city council and one which is routinely approved by a moment's glance are treated identically. The expense of administering the Schaumburg ordinance will vary from application to application. A flat fee, unlike the charge approved by *Cox,* is unrelated to actual cost and is therefore necessarily a tax on the exercise of a constitutional right. For this reason, analogous flat fees for the exercise of first amendment rights have been held unconstitutional by the lower courts. *See, e.g., Fernandes v. Limmer,* 465 F.Supp. 493 (N.D. Tex. 1979); *ISKCON v. Lentini,* 461 F.Supp. 49 (E.D. La. 1978); *ISKCON v. Griffin,* 437 F.Supp. 666 (W.D. Pa. 1977); *cf. Bayside Enterprises, Inc. v. Carson,* 450 F.Supp. 969 (M.D. Fla. 1978); *Moffett v. Killian,* 360 F.Supp. 707 (E.D. Pa. 1966); *New Times, Inc. v. Arizona Board of Regents,* 20 Ariz.App. 422, 513 P.2d 960 (1973) (cases in which flat fees proven to be disproportionate to costs of regulation and hence unconstitutional).

to all, not merely to those who can pay their own way." *Murdock v. Pennsylvania, supra* at 111.

C. The Curfew, on Its Face, Abridges the Immemorial Right to Communicate in Public Streets and Parks and, in Any Event, Is an Overbroad Restriction on Expression.

Schaumburg, Ill., Code §22-24 (1974) restricts charitable solicitations to the hours of 9:00 a.m. to 6:00 p.m. and excludes Sunday completely. The restriction is not limited to door-to-door solicitation. Instead the curfew applies to all solicitations within the village and completely closes the public streets and parks to this variety of expression for more than two-thirds of the time. A time restriction which thus partially closes the traditional "public fora" should be subjected to the closest constitutional scrutiny.

The requirement that restrictions on expression must serve a compelling state interest is most critical in the context of the classic "public forum." The beginning proposition is, of course, that certain public places, such as a city's streets and parks, occupy a central position with respect to the rights guaranteed by the first amendment, a position hallowed by history and tradition as well as by the amendment's legal mandate. The streets and parks are places which "have achieved a special status in our law." L. Tribe, *American Constitutional Law* §12-21 at 689 (1978). In Professor Kalven's words, these places are subject to "a kind of first amendment easement," Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 13, and their use by the people for the exercise of basic liberties cannot be lightly abated.

This principle was first set forth in plenary fashion in *Hague v. CIO,* 307 U.S. 496, 515-16 (1939) (opinion of Roberts, J.)

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Soon after *Hague,* Justice Roberts' words were fully endorsed by the entire Court in a series of opinions which irrefutably established a comprehensive view of the streets and parks as a public forum. *See, e.g., Jamison v. Texas,* 318 U.S. 413, 415-16 (1943); *Schneider v. New Jersey,* 308 U.S. 147, 160 (1939). More recent cases have left no doubt as to the continuing vitality of Justice Roberts' opinion. *See, e.g., Grayned v. City of Rockford,* 408 U.S. 104, 115 (1972); *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, 152 (1969); *Kunz v. New York,* 340 U.S. 290, 293 (1951).

The curfew ordinance, which completely prohibits the exercise of fundamental first amendment rights in

the streets and parks and elsewhere within Schaumburg after six in the evening and before nine in the morning, regardless of any other circumstances, does precisely what the law of the public forum condemns, "in the guise of regulation" to abridge or deny the "privilege of a citizen of the United States to use the streets and parks for communication of views on national questions. . . ." *Hague v. CIO, supra* at 516.

This Court has never upheld such a blanket and sweeping ban.[30] *Jamison v. Texas, supra,* for example, after allowing that "states may provide for control of travel on their streets" and "may punish conduct on the streets which is in violation of a valid law," emphasized that

> one who is rightfully on *a street which the state has left open to the public* carries with him there as elsewhere the constitutional right to express his views in an orderly fashion. This right extends to the communication of ideas by handbills and literature as well as by the spoken word.

Id. at 416 (emphasis added).

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[30]The Court has, on occasion, noted in dicta that the states may impose "reasonable police regulations of time and manner of distribution." *Martin v. City of Struthers,* 319 U.S. 141, 147 (1943); *see Cantwell v. Connecticut,* 310 U.S. 296, 306-07 (1939). *See also Hynes v. Mayor of Oradell,* 425 U.S. 610, 616-17, 619, 620 (1976). However, the Court has never considered on the merits a broad first amendment curfew of the kind imposed by the Schaumburg ordinance, and there is no reason to suppose that it would apply any standard to such a restrictive enactment other than that explained in detail in *Grayned v. City of Rockford,* 408 U.S. 104, 115 (1972), for "reasonable 'time, place and manner' regulations", *id.* at 115, of expressive activity in general. As discussed in the text, the Schaumburg curfew falls far short of meeting the criteria established in *Grayned* and fails as well to satisfy the less restrictive alternative test set forth in *Martin* itself.

Similarly, *Edwards v. South Carolina,* 372 U.S. 229 (1963), reversed the convictions of a group of civil rights demonstrators for breach of the peace which arose out of a peaceable assembly at the State House. Critical to the reversal was the fact that the demonstration had occurred in "periods during which the State House grounds were open to the public. . . ." *Id.* at 236.

There is no question here, of course, but that Schaumburg "has left [the streets] open to the public" after 6:00 p.m. for any lawful purpose other than charitable solicitation. Schaumburg has not purported to impose on its citizens a general six o'clock curfew, but singles out certain first amendment activities as conduct which, after that hour, is punishable by infliction of criminal penalties. This retention of use of the streets by the public for other purposes, while forbidding such use to peaceable and otherwise lawful protected expression, cannot be done consistently with the first amendment.

Assuming *arguendo* that a curfew may be adopted while the streets and parks are open to the general public, it must be narrowly tailored to further a compelling government interest. The touchstone here is *Grayned v. City of Rockford,* 408 U.S. 104 (1972). First, *Grayned* set the framework by making clear that a purported "time, place and manner" regulation of speech is overbroad and therefore facially unconstitutional "if in its reach it prohibits constitutionally protected conduct." *Id.* at 114 (footnote omitted). "The crucial question . . . is whether the ordinance sweeps within its prohibition what may not be punished under the First and Fourteenth Amendments." *Id.* at 114-15.

Grayned also supplies the tools for making this determination in a given case. Although "reasonable 'time, place and manner' regulations may be necessary to further significant governmental interests, and are permitted," *id.* at 115 (footnote omitted), the concept of "reasonableness" takes on a special coloration in this context.

> Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; the regulation must be narrowly tailored to further the State's legislative interest. Access to the "streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly. . . ." Free expression "must not, in the guise of regulation, be abridged or denied."

Id. at 116-17 (footnote omitted, bracketed material and ellipses in the original).

An examination of several of the leading cases on "time, place and manner" regulations reveals that no case has sustained a blanket ban on the use of the streets such as is contained in the present ordinance, in which an irrebuttable and absolute time limitation is imposed without heed to any of the other surrounding circumstances. *Grayned* itself is an excellent illustration. There, the ordinance, while arguably affecting protected speech, referred only to the making of a "noise of diversion". Moreover, it was carefully limited in time and place to "grounds adjacent to any building in which a school . . . [was] in session. . . ." *Id.* at 107-08. Finally, the ordinance purported to apply only to certain limited circumstances, where the "noise or diversion . . . disturbs or tends to disturb the

peace or good order of such school session. . . ." *Id.* at 108.

This Court upheld this focused, narrow ordinance, but in doing so made clear that a law which trod beyond such bounds would be beyond the constitutional pale. Of the enactment before it, this Court said that

> Rockford's anti-noise ordinance goes no further than *Tinker* [*v. Des Moines Independent School District*, 393 U. S. 503 (1969)] says a municipality may go to prevent interference with its schools. It is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with First Amendment rights. Far from having an impermissibly broad prophylactic ordinance, Rockford punishes only conduct which disrupts or is about to disrupt normal school activities. *That decision is made, as it should be, on an individual basis, given the particular fact situation.* Peaceful picketing which does not interfere with the ordinary functioning of the school is permitted.
>
> . . .
>
> The anti-noise ordinance imposes no such restriction on expressed activity *before or after the school session*, while the student/faculty "audience" enters and leaves the school.

Id. at 119-20 (footnote omitted, emphasis added).

Thus, *Grayned* vividly demonstrates the intensive scrutiny with which the Court will view a purported "time, place and manner" regulation on speech in a classic public forum. The reasoning of Mr. Justice Marshall in *Grayned* makes apparent that the instant Schaumburg ordinance would not survive that scrutiny.

Notably, the Rockford ordinance in *Grayned* was subjected to the most exacting constitutional analysis even though as the Court pointed out it was aimed at conduct, "noise or diversion" that frequently would not enjoy any special protection at all. *Id.* at 120. The facial overbreadth analysis was required, however, even in these circumstances, because the ordinance's language potentially swept "within its prohibitions what may not be punished under the First and Fourteenth Amendments". *Id.* at 115.

To the contrary, here the punitive sanctions of the Schaumburg ordinance are aimed specifically at charitable solicitation on "public streets and ways". Schaumburg, Ill., Code §22-20 (1974). The subject of regulation is not "conduct in the shadow of the First Amendment," in which context "overbreadth scrutiny has generally been somewhat less rigid," *Broadrick v. Oklahoma,* 413 U.S. 601, 614 (1971), but rather activity which enjoys the fullest measure of first amendment protection, *see, e.g., Schneider v. New Jersey, supra.* Accordingly, if anything, this ordinance must be viewed with an even higher degree of constitutional circumspection than was the case in *Grayned.*

In any event, the present ordinance utterly fails the test set forth in *Grayned.* First, the ordinance does not purport to punish "only conduct which disrupts or is about to disrupt normal . . . activities". Rather, as noted, only presumptively peaceful and protected activities are covered. Further, a violation is not triggered "on an individualized basis, given the particular fact situation", but on precisely the opposite basis, using a blanket ban with no regard whatsoever for the facts of any given case.

Moreover, while the Rockford ordinance permitted, even during school hours, "[p]eaceful picketing which does not interfere with the ordinary functioning of a school", analogous peaceful, non-intrusive activities are precisely what is here prohibited. Finally, the *Grayned* Court was careful to note that even the anti-noise prohibition went out of effect "before or after the school session". The fact that it was only during school hours, then, where a particularly compelling nexus was present between noise and the normal functioning of school, saved the *Grayned* ordinance from overbreadth. Here, of course, only the barest hint of a connection is present between the broad time prohibition of the ordinance and the evils Schaumburg purports to prevent. The Schaumburg ordinance is in sum exactly the kind of "impermissibly broad prophylactic ordinance" condemned by the first amendment.

Other leading "time, place and manner" decisions are completely in accord with the *Grayned* analysis and similarly require invalidation of the ordinance. In *Cameron v. Johnson,* 390 U.S. 611 (1968), for example, the Mississippi statute, while concededly reaching "picketing . . . intertwined with expression and association", narrowly proscribed such picketing only "if engaged in a manner which obstructs or unreasonably interferes with ingress or egress to or from a courthouse". *Id.* at 617. That statute, therefore, did not prohibit any " 'activity [which] bears [a] necessary relationship to the freedom to . . . distribute information or opinion.' *Schneider v. State,* [*supra* at 161]." Again, quite the contrary obtains here.

Similarly, the judicial obstruction statute upheld by *Cox v. Louisiana,* 379 U.S. 559 (1965), was a "precise,

narrowly drawn regulatory statute which proscribes certain specific behavior". *Id.* at 562. No conviction could be had under the Louisiana law unless it was found, for example, that the defendant acted "with the intent of interfering with, obstructing, or impeding the administration of justice". *Id.* at 560. Again, the Court emphasized that it was not dealing with "a pure form of expression", such as solicitation, for example, "but with expression mixed with particular conduct". *Id.* at 564 (emphasis supplied).[31]

Moreover, the curfew cannot be upheld on the ground that, while prohibiting absolutely any canvassing or soliciting fifteen hours a day, six days a week, such activity is permitted at other times. The law has long been stated by *Schneider v. New Jersey, supra* at 163, that

> the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty in appropriate places abridged on the plea that it may be exercised in some other place.

Accord, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975). There is no reason in logic or doctrine for this principle, so clearly applicable to the "place" component of the "time, place and manner" equation, not to apply equally to the

[31]The Schaumburg ordinance resembles the law held unconstitutional by *Davis v. Francois,* 395 F.2d 730 (5th Cir. 1968), which prohibited, *inter alia,* picketing by more than two people on streets and sidewalks. The present enactment does not pertain to a permissible "isolation of a legitimate governmental interest". *Id.* at 635 (footnote omitted). Like the ordinance invalidated in *Davis,* "it extends to all kinds of facilities in the [Village] though each may present different considerations". *Id.* at 735.

coordinate factor of "time", particularly where use of the public streets themselves is at issue.[32]

Thus, the blanket curfew is plainly unconstitutional. Even the door-to-door aspect of the curfew is by itself an overbroad and gratuitous restriction on expression. *Martin v. City of Struthers,* 319 U.S. 141 (1943), made clear that a regulation of first amendment protected activities carried out by calling upon householders, is "unreasonable" as a matter of law if there exists a less restrictive alternative which substantially vindicates the government's legitimate interests in exacting such a regulation. *Martin* involved an ordinance which generally prohibited door-to-door distribution and solicitation. *Id.* at 142. Following the Court's remarks concerning "reasonable . . . regulations of time and manner," the Court noted that

> [t]he dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden

[32]The inclusion of the entire day of Sunday within the curfew is by itself an unjustifiable restriction on expression. The commonly asserted justifications for a curfew are prevention of crime and of annoyance. Whatever the factual basis for the belief that solicitations are more likely to facilitate crime and to cause annoyance at night rather than by day, *but cf. Martin v. Struthers,* 319 U.S. 141 (1943) (door-to-door solicitation upheld against restrictive ordinance in factory community in which many workers slept by day), neither crime nor annoyance are more likely to occur on Sunday than on any other day. Nor is solicitation a commercial activity, which the state may regulate in an effort to make Sunday a day of uniform quiet and repose. *McGowan v. Maryland,* 366 U.S. 420 (1961). On the contrary, if the solicitation is itself religious in nature or even if it is merely conducted by a church for a charitable end, Sunday is the most appropriate day conceivable for it to be made.

> by the Constitution, the naked restriction of the dissemination of ideas.

Id. at 147.

Justice Black then pointed out the wide scope of the Struthers ordinance which made "a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away". *Id.* at 148 (footnote omitted). A clearly less restrictive alternative was available by which the city's interest could be achieved, by making it "an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed". *Id. See* Stone, *Fora Americana: Speech in Public Places,* 1974 Sup. Ct. Rev. 233, 264-65. *Compare Rowan v. Post Office Department,* 397 U.S. 728 (1970) (statute permitting householder to prohibit future mailings of erotic literature held valid where burden of acting was upon the individual recipient to foreclose communication) *with Lamont v. Postmaster General,* 381 U.S. 101 (1965) (statute putting burden on addressee affirmatively to request delivery of communist literature impeded delivery even to a willing recipient).

Thus, in *Martin* the legitimate interests of the city could easily be served without the sweeping prohibitions imposed by the ordinance at issue.

> A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers.

Martin v. Struthers, supra at 148 (footnote omitted).[33] *See Cantwell v. Connecticut, supra* at 306.

Even as to door-to-door activity, the full force of *Martin's* less restrictive alternative analysis is applicable to the purported "time" regulation of the Schaumburg ordinance. The very alternative proposed by *Martin* remains available to Schaumburg, and thus *Martin* mandates that it or some analogous provision be employed if Schaumburg wishes to legislate in this area. Therefore the curfew imposed by Schaumburg, no less than the prohibition of the Struthers ordinance, unnecessarily restricts door-to-door campaigns within the village limits.

The applicability of the *Martin* alternative is especially clear in the context of the Schaumburg law, for the second sentence of §22-24 of the ordinance, immediately following the curfew provision, is itself a rather close approximation of Justice Black's proposal in *Martin*. "Nothing herein provided shall permit a solicitor to go upon any premises which has posted a sign indicating 'no solicitors or peddlers invited.' " Plainly then, Schaumburg is quite capable of drafting an ordinance which protects its legitimate interest while remaining less restrictive of first amendment rights than the severe curfew provided for in the same section of the ordinance.

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[33]As has been noted, the curfew imposed by the Schaumburg ordinance applies to solicitations made by the "use of the public streets and public ways." Schaumburg, Ill., Code §22-20 (1974), as well as those made door-to-door. The second of the two alternatives mentioned in *Martin* is applicable in the former context as well.

D. The Requirement of a Statement of Compliance With the Illinois Charitable Solicitation Act in Order to Obtain a Permit Completely Bars Organizations Exempt From That Act From Soliciting Within Schaumburg and Consequently Violates the First Amendment.

Schaumburg, Ill., Code §22-20(e)(1974) requires that as a condition of obtaining a permit to solicit charitable contributions within the village an applicant provide

> [a] written statement of recent date by the Attorney General of Illinois that the organization has complied with the provisions of "An Act to Regulate Solicitation and Collection of Funds for Charitable Purposes," Illinois Revised Statutes, chapter 23, section 5101, and such statute as it may hereafter be amended.

However, the state statute expressly exempts from its operation religious organizations. *See Citizens for a Better Environment v. Village of Schaumburg,* 590 F.2d 220, 244, n.5 (7th Cir. 1978). Thus, a religious organization as recognized by the state literally cannot comply with the permit requirement if Schaumburg chooses to treat its solicitation as charitable, as indeed has occurred with respect to the Unification Church.

The Illinois charitable solicitation act provides for an exemption of a religious organization through the filing of an initial statement with the Attorney General and a determination by him that its purposes are "actual and genuine" and notification of that decision. From the moment of that notification the act does "not apply to a corporation sole or other religious corporation, trust or organization incorporated or established for religious purposes". Ill. Ann.Stat., ch. 23, §5103(a) (1968) (Solicitation of Funds for Charitable Purposes,

Laws 1963, p. 2082, §2). Schaumburg thus requires a statement of recent date of compliance with a statute which does not apply to a church as a precondition for soliciting contributions.

If onerous prior restraints and restrictions on religious and other protected solicitation are unconstitutional, impossible ones necessarily are. Schaumburg's failure to follow the lead of the state and to plainly exempt religious solicitation from the operation of the ordinance necessitates that this provision be declared unconstitutional as applied to a church.

CONCLUSION.

Accordingly, and for the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

DATED: July 21, 1979.

Respectfully submitted,

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APPENDIX A.

AMENDMENTS TO UNITED STATES CONSTITUTION.

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Schaumburg Village Code, Chapter 22, Article III.

Article III. Charitable Organizations.

Sec. 22-19. Definitions.

For the purpose of this article, the following words and phrases shall have the following meanings unless a different meaning is required by the context:

Charitable organization. Any benevolent, philanthropic, patriotic, not-for-profit, or eleemosynary group, association or corporation, or such organization purporting to be such, which solicits and collects funds for charitable purposes.

Charitable purpose. Any charitable, benevolent, philanthropic, patriotic, or eleemosynary purpose,

Contribution. The promise or grant of any money or property of any kind or value, including payments for literature in excess of the fair market value of said literature. (Ord. No. 1052, § 2.)

Sec. 22-20. Permits—Required; contents of application.

Every charitable organization, which solicits or intends to solicit contributions from persons in the village by door-to-door solicitation or the use of public streets and public ways, shall prior to such solicitation apply for a permit. Said application shall be made to the village clerk and shall include the following information:

(a) The name of the organization and the name under which it intends to solicit contributions.

(b) The name and address of the person in charge of solicitation in the village.

(c) The names and addresses of all the persons who will solicit contributions in the village.

(d) The dates and times of day such solicitations are to be made and the geographic area within the village wherein such solicitation shall be conducted at a particular time and day.

(e) A written statement of recent date by the Attorney General of Illinois that the organization has complied with the provisions of "An Act to Regulate Solicitation and Collection of Funds for Charitable Purposes," Illinois Revised Statutes, chapter 23, section 5101, and such statute as it may hereafter be amended.

(f) Satisfactory proof that the organization is a tax exempt organization under the Internal Revenue Code of the United States, section 501(c)(3).

(g) Satisfactory proof that at least seventy-five per cent of the proceeds of such solicitations will be used directly for the charitable purposes of the organization. For such purposes, the following items shall not be deemed to be used for the charitable purposes of the organization, to wit:

(1) Salaries or commissions paid to solicitors;

(2) Administrative expenses of the organization, including, but not limited to, salaries, attorneys' fees, rents, telephone advertising expenses, contributions to other organizations and persons, except as a charitable contribution and related expenses incurred as administrative or overhead items.

For the purpose of satisfying the requirements of subparagraph (g), the organization shall submit a certified audit of the last full year of operations, indicating the distribution of funds collected by the organization, or such other comparable evidence as may demonstrate the fact that at least seventy-five per cent of the funds collected are utilized directly and solely for the charitable purpose of the organization. (Ord. No. 1052, § 3.)

Sec. 22-21. Same—Submission and verification of applications; issuance.

All applications shall be submitted to the village clerk and shall be verified under oath by a responsible officer of the soliciting organization. All completed applications shall be submitted by the village clerk to the village board. If the village board shall find and determine that all requirements of this article have been met, a permit shall be issued specifying the dates

and times at which solicitation may take place. (Ord. No. 1052, § 7.)

Sec. 22-22. Same—Fee.

Each application for a charitable solicitation permit shall be accompanied by a fee in the amount of ten dollars. (Ord. No. 1052, § 6.)

Sec. 22.23. Indicted or convicted felons as solicitors.

It shall be unlawful for any charitable organization to utilize as a solicitor any person who has been convicted of a felony or is presently under indictment for a felony. (Ord. No. 1052, § 5.)

Sec. 22-24. Hours; entering premises posted for "no soliciting."

No permit issued under the provisions of this article shall permit solicitation before the hour of 9:00 A.M. and after the hour of 6:00 P.M., or on Sunday. Nothing herein provided shall permit a solicitor to go upon any premises which has posted a sign indicating "no solicitors or peddlers invited." (Ord. No. 1052, § 4.)

APPENDIX B.

Webster's Third New International Dictionary definitions of terms used in Schaumburg, Ill., Code §22-19 (1974) and related words:[1]

be·nev·o·lence |be'nevelen(t)s| n -s [ME, fr. L benevolentia, fr. benevolent-, benevolens + -ia] 1 : benevolent feeling : kindly disposition to do good and promote the welfare of others : goodwill (we shook hands and I again glowed with ~ to my fellow men —Richard Aldington) 2 archaic : personal regard or affection (his dislike of application and control prevented his acquiring the ~ of his superiors —James Mill) 3 : an expression of benevolence: a : an act of kindness b : a generous gift 4 : a compulsory contribution or tax formerly levied by certain English kings with no other authority than the claim of prerogative

[p. 204]

be·nev·o·lent |-lent| adj [ME, fr. L benevolent-, benevolens, fr. bene well + volent-, volens, pres. part. of velle to will, wish — more at will] 1 : marked by a kindly disposition to promote the happiness and prosperity of others or by generosity in and pleasure at doing good works (a ~ donor) 2 : marked by or suggestive of goodwill or benign feelings : lacking any hostility (a ~ judge) (a ~ smile) 3 : arising from or prompted by motives of charity or a sense of benevolence : philanthropic (a ~ society) — be·nev·o·lent·ly adv —be·nev·o·lent·ness n -es

[p. 204]

char·i·ta·ble |'chared·ebel, -reteb- also -er-| adj [ME, fr. MF, fr. OF, fr. charite charity + -ite -ity — more at charity] 1 : exhibiting the virtue of Christian love : full of love and goodwill for others : benevolent, kindly 2 a :

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[1]Pronunciations and some diacritical marks are not reproduced.

practicing or showing charity : generous in assistance to the poor (a man ~ to all in need) b : of, for, or relating to charity (~ gifts) : having the quality of charity (a ~ impulse) (money spent for ~ purposes) : administering charity (~ institutions) 3 : liberal in judging others : inclined to look on the best side and to avoid harsh judgment (it is more ~ to suspend judgment — Ellen Glasgow) : arising from or dictated by kindness (a ~ interpretation of his actions) — char·i·table·ness |-belnes| n -es — char·i·ta·bly |-eble, -li| adv

[p. 378]

charitable trust n : a trust set up for the benefit for the public usu. setting out a definite charitable purpose for an undetermined number of beneficiaries

[p. 378]

char·i·tar·i·an |....tereen| n -s [charity + -arian (as in humanitarian)] : a charitable person : one that aids or supports charitable enterprises

[p. 378]

char·i·ty |'chared·e, ete, -i also -er-| n -es often attrib [ME charate, fr. OF charate, fr. LL caritat-, caritas Christian love, fr. L, costliness, high regard, love, fr. carus dear, costly, loved + -itat-, -itas -ity akin to OIr caraim I love, Skt kama love, desire] 1 : Christian love: a : the virtue or act of loving God with a love which transcends that for creatures and of loving others for the sake of God b : divine love for man : love in its perfection c : the act of loving or the disposition to love all men as brothers because they are sons of God : love of fellow men 2 a : the kindly and sympathetic disposition to aid the needy or suffering : liberality to the poor, to benevolent institution, or to worthy causes (the ~ of the neighbors was exhausted and there was no more food in the house — Vicki Baum) b : an act or series of acts of aid to the needy (performed many charities among her neighbors) c : whatever is given to the needy or suffering for their relief : Alms (give her a ~) d : an organization or institution engaged in the free assistance of the poor, the suffering, or the distressed (a list of deserving charities) e : public provision for the care or relief of the needy (too proud to accept ~) f : the recipient of charitable assistance (he is one of my father's charities) 3 a(1) : love or affection for others: a disposition to good will, kindliness, and sympathy (no one minded him laughing at them when they saw the endless ~ of his eyes —Mary Webb) (2) : an act or instance of good will or affection b : an eleemosynary gift : a gift (as by grant or devise) of real or personal property to the use of the public or any portion of it as distinct from specific individuals for any beneficial or salutary purpose c : an institution (as a hospital, library, or school) founded by a gift and intended for the use of the public 4 : as disposition to liberal lenient tolerant judgment and toward minimizing shortcomings and putting the best possible construction on the characteristics or actions of others (a kindly critic liked for his ~ and moderation) 5 : a refreshment dispensed between meals in a monastery 6 : Jacob's Ladder 1 a 7 : charity stamp syn see mercy

[p. 378]

el·ee·mos·y·nar |ele'masene(r) also -le(e)'m- sometimes -azen-| n -s [ML eleemosynarius, fr. LL eleemosyna alms + L -arius -ary, -ar (n. suffix) — more at alms] : one that distributes charity or doles out relief : almoner

[p. 733]

el·ee·mos·y·nary |-en,ere, -ri| adj [ML eleemosynarius, fr. LL eleemosyna + L -arius -ary (adj. suffix)] 1 : of or relating to charity : charitable, philanthropic (a rich man given to many ~ activities) (~ relief) 2 a : nonprofit and receiving all or a great part of sustaining funds from donations or gifts (about 90 percent of the hospitals are of a governmental, charitable, or ~ and non-

profit character —U.S. Code) (churches, lodges, and other ~ institutions —Sat. Eve. Post) b : provided by an institution of this nature (an ~ education)

[p. 733]

eleemosynary corporation n : a corporation organized for charitable purposes — contrasted with civil corporation

[p. 733]

[2]non·profit |(') .... +| adj [non- + profit, n.] 1 : not conducted or maintained for the purpose of making a profit (a ~ agency supported by endowments and private contributions — Current Biog.) 2 : not based on the profit motive : not organized on capitalistic principles : socialist (decreed the creation of a ~ society —Time)

[p. 1538]

pa·tri·ot |'pa·treet, -e,at, usu Brit 'pa··; usu -d·+V| n -s often attrib [MF patriote, fr. LL patriota, fr. Gk patriotes, fr. patrios of one's father, of or characteristic of one's forefathers, fr. patr-, pater father — more at father] 1 obs : a fellow countryman : compatriot 2 a : a person who loves his country and defends and promotes its interests; esp : a soldier who fights for love of country b : an enthusiast for a cause other than national (the South's cotton ~s —Time) 3 obs : lover, amateur 4 a usu cap : an English parliamentary faction opposed to Sir Robert Walpole esp. from 1732-1742 b : one who advocates or promotes the independence of his native soil or people from the country or union of countries of which it is a part (as a colony) (immortalized by the illustrious appellation of the ~ army —George Washington) (a band of fiery ~s —D. G. Haring) c : patrioteer (the

[2]This term is closest in meaning to "not-for-profit" which is the precise term used in the ordinance, but which is not defined by the dictionary.

most bloodthirsty ~s in the safest swivel chairs —Walter Lippmann) 5 a : one who remains loyal to his country when it is occupied by an enemy b : a member of a resistance group.

[p. 1656]

pa·tri·ot·ic | pa·tre ad·|ik, -at|, |ek, sometimes & Brit usu ,pa··| also pa·tri·ot·i·cal | |ekel, |ek-| adj [patriot + -ic, -ical] : inspired by patriotism : befitting or characteristic of a patriot : actuated by love of one's country : devoted to one's country (a ~ statesman) (stirring ~ exercises —Springfiled (Mass.) Union) — pa·tri·ot·i·cal·ly | |ek(e)le, |ek-, -li| adv

[p. 1656]

phil·an·throp·ic |....thrapik, pek| also phil·an·throp·i·cal |-pekel, -pek-| adj [philanthropic fr. F philanthropique, fr. Gk philanthropos + F -ique -ic; philanthropical fr. philanthropy + -ical] 1 : of, relating to, or characterized by philanthropy : benevolent, humanitarian (~ sympathy for the cause of the slave —V. L. Parrington) (found time to devote to church, civic, and ~ affairs —Marian Silveus) 2 : dispensing or receiving aid from funds set aside for humanitarian purposes : eleemosynary (~ foundation) (the need for books at nearby hospitals and ~ homes —Wonderful World of Books) — phil·an·throp·i·cal·ly |-pek(e)le, -pek-, -li|adv

[p. 1697]

phi·lan·thro·pism |fe'lan(t)thre, pizem, -laan-| n -s [philanthropy + -ism] : philanthropy

[p. 1697]

phi·lan·thro·pist |-pest| n -s [philanthropy + -ist] : one characterized by or practicing philanthropy : altruist, humanitarian — phi·lan·thro·pis·tic |.....pistik| adj

[p. 1697]

phi·lan·thro·py |fe'lan(t)threpe, -iaan-, -pi| n -es [LL philanthropia, fr. Gk philanthropia, fr. philanthropos loving mankind (fr. phil- + anthropos man) + -ia -y — more at anthrop-] 1 : goodwill toward one's fellowmen esp. as expressed through active efforts to promote human welfare : humanitarianism (~ . . . is civic, social, and amply beneficial —J. A. Franquiz) — contrasted with misanthopy 2 a : an act or instance of deliberative generosity : a contribution made in a spirit of humanitarianism (among his philanthopies were full tuition scholarships for deserving students) b (1) : an organization distributing funds for humanitarian purposes (funds for the new rehabilitation center came from two of the big philanthropies) (2) : an institution or agency supported by such contributions (community chest funds are distributed among various philanthropies)

[p. 1697]